American Journal of International Law

April 1972
Vol. 66 No. 2

Published by The
American Society of International Law

PATRONS OF THE SOCIETY

Honorable Arthur H. Dean
Honorable Herman Phleger
Mrs. Benjamin J. Tillar (deceased)
Mr. W. Robert Morgan

In Memoriam

Dr. James Brown Scott
Mr. Henry C. Morris
Mr. Arthur K. Kuhn
Mr. Alexander Freeman

PATRONAGE, GIFTS AND BEQUESTS

Upon donation to the Society of $5,000 or more by gift or bequest, any member of the Society or individual eligible for membership may be elected a Patron of the Society. Upon donation of at least $5 000 in the name of a deceased person, such person may be elected a Patron posthumously.

Gifts and bequests may be made in the name of the American Society of International Law, Washington, D. C. Such contributions are deductible from Federal returns for income, estate and gift tax purposes. The Society is incorporated by Act of Congress approved September 20, 1950 (64 Stat. 839).

MANLEY O. HUDSON MEDAL

The American Society of International Law bestows from time to time without regard to nationality a gold medal to commemorate the life work of Manley O. Hudson. Such awards are made for pre-eminent scholarship and achievement in international law and in the promotion of the establishment and maintenance of international relations on the basis of law and justice. Medals have been awarded to Manley O. Hudson (1956), Lord McNair (1959), Philip C. Jessup (1964), Charles De Visscher (1966), and Paul Guggenheim (1970).

AMERICAN JOURNAL OF INTERNATIONAL LAW

VOL. 66 April, 1972 NO. 2

CONTENTS

CONTENTS (*cont'd.*)

OFFICIAL DOCUMENTS

Manuscripts in triplicate may be sent to either the Acting Editor-in-Chief of the JOURNAL, Northwestern University Law School, 357 East Chicago Avenue, Chicago, Illinois 60611, or the Assistant Editor. Subscriptions, orders for back numbers, correspondence with reference to the JOURNAL, and books for review should be sent to the Assistant Editor of the JOURNAL, 2223 Massachusetts Avenue, N. W., Washington, D. C. 20008.

The JOURNAL is published five times a year and is supplied to all members of The American Society of International Law without extra charge. The annual subscription to non-members of the Society is $30.00. Available back numbers of the current volume of the JOURNAL will be supplied at $6.00 a copy; other available numbers at $7.50 a copy.

EDITORIAL AND EXECUTIVE OFFICE:
2223 MASSACHUSETTS AVENUE, N. W.
WASHINGTON, D. C. 20008

PUBLICATION OFFICE:
PRINCE AND LEMON STREETS
LANCASTER, PA. 17604

Second-class postage paid at Lancaster, Pa.

The American Society of International Law

The American Society of International Law was organized in 1906 "to foster the study of international law and to promote the establishment and maintenance of international relations on the basis of law and justice."

The Society serves as a meeting place and forum for scholars, teachers, officials, lawyers and others, from some ninety-seven countries. At the end of April, it holds a three-day Annual Meeting in Washington at which current problems of international law are discussed. The Society also sponsors regional meetings outside of Washington in co-operation with other institutions. Salient questions of international law and relations are considered in depth by panels and study groups organized by the Society's Board of Review and Development. Works of scholarship are often published under the Society's auspices in connection with studies sponsored by the Board.

The Society periodically issues three publications:

The American Journal of International Law, the leading journal in the field of international law, has been published since 1907. A special number of the *Journal* carries the papers and discussions of the annual meeting of the Society. The *Journal* is distributed to all members of the Society without additional charge, and is available to non-members at a subscription rate of $30 a year.

International Legal Materials, a bimonthly, is a unique international collection of texts of current official documents, including legislation, treaties, court decisions, and reports. Subscription rates are $15 a year for members of the Society, $35 for others.

The monthly *Newsletter* provides members with news of the Society and other organizations in the field and reports on pending international litigation.

Society membership is open to all persons of whatever nationality and profession who are interested in its objectives. Dues are: regular, $25 for residents of the United States, $10 for non-residents; professional, $40; intermediate, $15; student, $7.50. Application for membership may be made on the form printed at the back of this issue of the JOURNAL.

OFFICERS OF THE SOCIETY, 1971–1972

Honorary President ..... PHILIP C. JESSUP

President ..... HAROLD D. LASSWELL

Executive Vice President ..... STEPHEN M. SCHWEBEL

Vice Presidents ..... RICHARD A. FALK, JOHN N. HAZARD, WILLIAM D. ROGERS

Honorary Vice Presidents: WILLIAM W. BISHOP, JR., HERBERT W. BRIGGS, ARTHUR H. DEAN, HARDY C. DILLARD, CHARLES G. FENWICK, LEO GROSS, GREEN H. HACKWORTH, JAMES N. HYDE, HANS KELSEN, CHARLES E. MARTIN, BRUNSON MACCHESNEY, MYRES S. MCDOUGAL, OSCAR SCHACHTER, JOHN R. STEVENSON, ROBERT R. WILSON.

Secretary ..... EDWARD DUMBAULD

Treasurer ..... FRANZ M. OPPENHEIMER

Assistant Treasurer ..... JAMES C. CONNER

LEGAL RESTRAINTS IN MODERN ARMS CONTROL AGREEMENTS

*By Eric Stein**

National Arms Policies and Postwar Arms Control Agreements

In theory, we may envisage five principal types of national arms policy, reflecting as many policy objectives:

(1) Arming to obtain the *greatest possible weapons preponderance* on the assumption that armed conflict is imminent. This policy of amassing military forces without regard for its effect on the other side results in an unrestrained arms race.

(2) Arming *to deter.* The idea of deterrence is familiar to lawyers since it figures so prominently in criminal law. According to Schelling, deterrence as a strategic concept "is concerned with influencing the choices that another party will make, and doing it by influencing his expectations of how we will behave."[1] Deterrence "requires that there be both conflict and common interest between the parties involved; it is as inapplicable to a situation of pure and complete antagonism of interest as it is to the case of pure and complete common interest."[2]

(3) *Arms control.* This policy envisages measures that aim at reducing the danger of war and at slowing down the arms race. Such measures may or may not involve actual restrictions upon military activities or reduction of armaments.

(4) Comprehensive, *reciprocal disarmament* ("general and complete disarmament"), usually seen as a scheme "embodied in a single grand treaty leading by stages from less to more drastic and radical measures."[3] In the final stage, the capabilities of national forces are reduced to those required for internal security only and a centralized international machinery is charged with peacekeeping.[4]

* Of the Board of Editors.

This article draws on materials used in a series of lectures at the Hague Academy of International Law in the summer of 1971; it is published here with the permission of the Academy. Other aspects treated in the lectures were: form of the arms control agreements; participants; negotiation forums; the role of the international law factor in arms control negotiations; legality of weapons of mass destruction; verification of compliance; dispute settlement and enforcement; duration, modification, review, termination. The complete text will appear under the title "Impact of New Weapons Technology on International Law: Selected Aspects," in the 1971 volume of Recueil des Cours of the Hague Academy of International Law.

[1] T. C. Schelling, The Strategy of Conflict at 13 (Cambridge, Mass.: Harvard University Press, 1960). [2] *Ibid.* at 11.

[3] H. Bull, The Control of the Arms Race—Disarmament and Arms Control in the Missile Age at 137 (New York: Frederick A. Praeger, 1961), referring to general and comprehensive disarmament.

[4] Comprehensive reciprocal disarmament in the sense of this alternative was the subject of the unsuccessful League of Nations Disarmament Conference in 1932. After the

(5) Unilateral disarmament, a concept that is self-explanatory.[5]

In reality, national policies of the principal Powers in the post-World-War II period have consisted essentially of a mix of deterrence and arms control, the second and third of the theoretical alternatives listed above. International negotiations on proposals for "general and complete disarmament" have made little progress. However, the two nuclear super-Powers, the United States and the Soviet Union, gradually came to recognize the cooperative aspect of their adversary relationship, a common interest in reducing the risk of a general nuclear war, in limiting its scope and damages should it occur, and in confining the cost of the arms race, if this could be done without undue risk.[6] Thus, over a period of years agreement has been reached on a series of "partial" or "collateral" arms control measures, mainly in the form of multilateral treaties.[7]

Three such treaties were designed to prevent the extension of the arms race to newly accessible environments: (a) the Antarctic Treaty, signed on December 1, 1959;[8] (b) the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, signed on January 27, 1967;[9] (c) the Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other

---

second World War, draft treaties on "general and complete disarmament" have been considered intermittently in the United Nations with little promise of an agreement. P. Noel-Baker, The Arms Race—A Programme for World Disarmament at 12–30, 42–46, 387–392 (London: Atlantic Books, Ltd.; New York: Oceana Publications, 1958); The United Nations and Disarmament 1945–1970 at 78–125 (New York: U.N., 1970). For a unique study of post-1946 negotiations, see B. G. Bechhoefer, Postwar Negotiations for Arms Control (Washington, D.C.: The Brookings Institution, 1961). See also A. Nutting, Disarmament: An Outline of the Negotiations (London-New York-Toronto: Oxford University Press, 1959).

[5] "Headlong Western Disarmament after World War II" may be offered as an example. Bechhoefer, note 4 above, at 5. For the above scheme generally, see Singer, "Weapons Technology and International Stability," 5 Centennial Review 415 at 424–427 (Fall, 1961). The scheme is a theoretical and necessarily arbitrary model that does not purport to include every conceivable national arms policy objective, *e.g.*, arming for "prestige," etc.

[6] See Schelling, note 1 above, at 11, 230.

[7] A Canadian lawyer-diplomat offers a useful classification of such measures, proposed and adopted up to 1965: A. Gotlieb, Disarmament and International Law—A Study of the Role of Law in the Disarmament Process at 68–69 (Toronto: Canadian Institute of International Affairs, 1965). See also Bull, note 3 above, at 155–157, 166–174; The United Nations and Disarmament, note 4 above, at 137–171.

[8] 402 U.N.T.S. 71; [1961] 12 U.S.T. 794. Entered into force June 23, 1961; 16 countries have ratified or acceded to this treaty. Arms Control Achievements 1959–1971, Arms Control and Disarmament Agency, Pub. 59 at 1 (Oct. 1, 1971. Washington, D.C.: U.S. Government Printing Office).

[9] [1967] 18 U.S.T. 2410. Entered into force Oct. 10, 1967; 89 states have signed and 60 have ratified or acceded. This treaty is referred to here as the Outer Space Treaty. The data on signatures and ratifications of this and the other treaties mentioned below are based on Arms Control and Disarmament Agency, Pub. 59, note 8 above. Because of the U.S. policy of non-recognition, the signatures or ratifications by the German Democratic Republic, the Byelorussian S.S.R. and the Ukrainian S.S.R. are not included in the totals.

Weapons of Mass Destruction on the Sea-bed and on the Ocean Floor and in the Subsoil Thereof, opened for signature on February 11, 1971.[10]

Three treaties relate specifically and exclusively to nuclear weapons: (a) the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, signed on August 5, 1963, after more than five years of negotiations;[11] (b) the Treaty on the Non-Proliferation of Nuclear Weapons, opened for signature five years later, on July 1, 1968;[12] (c) the Treaty for the "denuclearization" of Latin America, the so-called Treaty of Tlatelolco, signed on February 14, 1967.[13]

Most recently, agreement has been reached at the Conference of the Committee on Disarmament on a draft of a Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction.[14]

[10] Text in Appendix II, 10th Annual Report to Congress, Jan. 1, 1970–Dec. 31, 1970, U.S. Arms Control and Disarmament Agency 37–40 (1971). This treaty, which is not yet in force, is referred to as the Seabed Treaty. 83 states have signed, 19 have ratified.

[11] 480 U.N.T.S. 43; [1963] 14 U.S.T. 1313. Entered into force on Oct. 10, 1963; 106 states signed, 105 states ratified or acceded. This treaty is referred to here as the Partial Test Ban Treaty or the Test Ban Treaty.

[12] [1970] 21 U.S.T. 483. Entered into force March 5, 1970; 97 states signed, 70 ratified or acceded. This treaty is referred to here as the Non-Proliferation Treaty.

[13] Treaty for the Prohibition of Nuclear Weapons in Latin America, with Additional Protocols I and II, signed at Tlatelolco, Mexico City, on Feb. 14, 1967, U.N. Doc. A/C.1/946 (1967); 1967 Documents on Disarmament at 69–83 (Washington, D.C.: U.S. Arms Control and Disarmament Agency, 1967). The treaty entered into force on April 22, 1968; 22 Latin American states signed, 19 ratified or acceded to the treaty. The United States and the United Kingdom have signed and ratified Protocol II. It entered into force for the United States May 12, 1971. See Senate Res. of April 19, 1971, Cong. Rec. S 5060–5062 (1971). See, generally, Alfonso García Robles, The Denuclearization of Latin America (New York: Carnegie Endowment for Int. Peace, 1967); Robinson, "The Treaty of Tlatelolco and the United States," 64 A.J.I.L. 282 (1970).

Because of space limitations I was able to deal here only with arms control treaties of world-wide scope and for this reason it was impossible to include more than a few passing references to the Tlatelolco Treaty.

[14] CCD/353 of Sept. 28, 1971, in Annex A to the Report of the Conference of the Committee on Disarmament to the U.N. General Assembly, U.N. Doc. A/8457 and DC/234, Oct. 6, 1971.

Three bilateral agreements concluded by the United States and the Soviet Union should also be mentioned here:

(1) Memorandum of Understanding Regarding the Establishment of a Direct Communications Link ("Hot Line"), signed on June 20, 1963, 472 U.N.T.S. 163, [1963] 14 U.S.T. 825, T.I.A.S., No. 5362. See Fisher, "Arms Control and Disarmament in International Law," 50 Va. Law Rev. 1200 at 1203 (1964); Bunn, "Missile Limitation: By Treaty or Otherwise?" 70 Columbia Law Rev. at 12 (1970).

(2) An agreement to modernize the Washington-Moscow Direct Communications Link, signed on Sept. 30, 1971. It provides for the establishment of two satellite circuits (one by each party) as well as multiple terminals to increase both the capacity and reliability of the communications line. 65 Dept. of State Bulletin 401–403 (1971).

These two agreements are of limited legal interest since the only obligations accepted by the parties relate to the maintenance of specified means of communication between them.

Rapidly changing technology has posed serious problems for the negotiators, particularly where nuclear weapons were involved. Since "peaceful," non-military uses of nuclear energy may be converted to weapons uses, it was difficult to draw the line between prohibited and permitted activities and to define the minimum required safeguards against diversion of nuclear materials from peaceful to weapons uses. Moreover, since new technology is likely to produce improvements and new designs, the negotiators have been pressed by their military establishments to draft the prohibitions so as to exempt certain activities with promising development potential. This aspect becomes particularly important when an arms control measure deals with specific weapon systems, as was the case with the Seabed Treaty; and it will pose a perplexing drafting task in the current Strategic Arms Limitation Talks (SALT) where limitations on complex delivery and communications systems will have to be defined.[15]

Types of Legal Restraints in Arms Control Agreements

The purpose of this article is to explore the nature and significance of the legal restraints upon military activities which states accept upon becoming parties to the above treaties.

1. *Restraints Applicable to Newly Accessible Environments*

The environments concerned (Antarctica, outer space, deep seabed) have certain characteristics in common that influenced the course of negotiations: They have become accessible recently owing to new technology; the environments, or the particular prohibited uses thereof, have not been viewed as strategically vital by the super-Powers; the environments are not subject to national sovereign rights comparable to those over land or airspace; and since neither the super-Powers nor any other state has

(3) An agreement of Sept. 30, 1971, to reduce the risk of accidental outbreak of nuclear war covers three areas: (i) an obligation to take the steps each side feels necessary to guard against "accidental or unauthorized use of nuclear weapons"; (ii) arrangements for rapid communications should the danger of nuclear war arise from such nuclear incidents or from detection of unidentified objects on early-warning systems and an obligation to render harmless a nuclear weapon involved in such an incident; (iii) advance notification of planned missile launches which "will extend beyond . . . national territory in the direction of the other Party." 65 Dept. of State Bulletin 400–401 (1971).

The two agreements of Sept. 30, 1971, were concluded by the United States and Soviet negotiators in the "Strategic Arms Limitation Talks" (SALT) in parallel with the principal SALT negotiations envisaging bilateral agreements for the limitation upon, and control of, strategic nuclear delivery systems.

In a sense, the establishment of the International Atomic Energy Agency could also be listed among the "partial" arms control measures. Statute of the International Atomic Energy Agency, 276 U.N.T.S. 3, [1957] 8 U.S.T. 1093.

[15] On May 20, 1971, President Nixon and the Soviet Government announced that a decision had been made to concentrate in SALT on working out an agreement to limit the deployment of antiballistic missile systems (ABMs); and, together with concluding an agreement to limit ABMs, the two countries would agree on certain measures with respect to the limitation of offensive strategic weapons. Arms Control Achievements 1959–1971, note 8 above, at 8–9.

ever engaged in the prohibited activities, the military establishments have not acquired direct vested interests in such activities.

(a) Antarctic Treaty: "non-militarization"

The Antarctic Treaty seeks to preserve the "non-militarized" status of the Antarctic by prescribing in Article I that the continent shall be used "for peaceful purposes" only; it prohibits

> *inter alia*, any measures of a military nature, such as the establishment of military bases and fortifications, the carrying out of military maneuvers, as well as the testing of any type of weapons.[16]

Agreement on this provision was in large measure due to the fact that, unlike the Arctic areas, the Antarctic has been considered to be of a limited strategic value because "[a]nything that could be done in the Antarctic can be done from the seas and bases elsewhere and would not involve the extreme problems of logistics and supply facing any user of Antarctica." [17]

Although no definition of "peaceful purposes" is given in the treaty the formulation indicates that the parties meant to include all activities not clearly identified as military. Of course, the distinction between "military" and "peaceful" is often blurred: as Taubenfeld suggests, a launching pad built in Antarctica to accommodate a rocket carrying scientific equipment could be used to launch one with a nuclear warhead.[18] Moreover, Article I allows the continued use of military personnel and equipment "for scientific research or for any other peaceful purpose" in recognition of the importance of the type of support rendered, for example, to United States scientific activities by naval vessels, aircraft and personnel.[19]

Article V specifically prohibits "any nuclear explosions" in Antarctica and the disposal there of radioactive waste material.[20] The ban on nuclear explosions is not intended to include atomic power plants which may prove economical on the continent; [21] it does, however, clearly cover any and all nuclear-weapon tests, even if conducted underground and thus not proscribed by the Partial Test Ban Treaty. The ban probably includes

[16] See also Art. IX (1) (a) ("use of Antarctica for peaceful purposes only") and the first and fourth preambular paragraphs. See, generally, G. Mencer, Mezinárodně právní problémy Antarktidy 106–135 (Praha: Nakladatelství Československé Akademie Věd, 1963).

[17] H. Taubenfeld, A Treaty for Antarctica (International Conciliation, No. 531) at 262 (New York: Carnegie Endowment for International Peace, 1961).

[18] *Ibid.* at 283.

[19] Art. I (2). Hanessian, "The Antarctic Treaty—An Analysis of the Provisions of an Extraordinary International Treaty Up for Ratification by Twelve Countries," American University Field Staff Reports Series, Polar Area Series, Vol. 1, No. 2, at 10 (1960); *idem*, "The Antarctic Treaty, 1959," 9 Int. and Comp. Law Q. 436 at 468 (1960).

[20] According to Art. V (2), if all the contracting parties were to adhere to any broader international agreements on these subjects, those agreements were to apply to Antarctica. The ban on testing was added at the insistence of Latin American states in particular, which were concerned lest the fallout from any atmospheric tests be carried by northward winds to the Southern Hemisphere. Taubenfeld, *loc. cit.* note 17 above, at 285.

[21] Controlled reactions in a nuclear power reactor are not considered "explosions" within the meaning of the treaty.

also any nuclear explosions for peaceful purposes below the surface of the ice, which, some felt, might prove the best technique for opening the continent to mining or other development.[22]

It is noteworthy that the treaty applies to the extensive, fixed Antarctic ice shelves, but floating ice islands are excluded by implication. Rights of any state "under international law" with regard to the high seas are to remain unaffected. Since the width of the territorial waters is controversial in international law, the question of what constitutes the high seas was left undefined.[23]

(b) Outer Space Treaty: two different regimes

The arms control provisions in the Outer Space Treaty draw a sharp distinction between "the moon and other celestial bodies" on one hand and outer space on the other.

(i) The moon and other celestial bodies: "non-militarization"

The Antarctic Treaty served as a model for Article IV, second paragraph, of the Outer Space Treaty, which provides for non-militarization of the moon and other celestial bodies in terms closely approximating the Antarctic Treaty:

> The moon and other celestial bodies shall be used by all States Parties to the Treaty exclusively for peaceful purposes. The establishment of military bases, installations and fortifications, the testing of any type of weapons and the conduct of military maneuvers on celestial bodies shall be forbidden. The use of military personnel for scientific research or for any other peaceful purposes shall not be prohibited. The use of any equipment or facility necessary for peaceful exploration of the moon and other celestial bodies shall also not be prohibited.[24]

If read literally, this paragraph is not as widely phrased as the corresponding provision in Article I of the Antarctic Treaty which prohibits *any measures of a military nature,* with certain specific measures being enumerated as examples.[25] An argument could therefore be made that less extensive non-militarization was intended for the moon and other celestial bodies than for Antarctica. More specifically, it could be argued that only those military activities that are enumerated in the above-quoted Article IV of the Outer Space Treaty are forbidden, while other activities of a military nature are allowed as long as they aim at "peaceful purposes";

[22] On peaceful explosions see below at 268.

[23] Art. VI. Taubenfeld, *loc. cit.* note 17 above at 286.

[24] Darwin reports that the sentences relating to personnel and equipment represented "a difficult compromise reached at a late stage of negotiations." Darwin, "The Outer Space Treaty," 42 Brit. Yr. Bk. Int. Law 278 at 284 (1967). See also Dembling and Arons, "The United Nations Celestial Bodies Convention," 32 J. of Air Law 535 at 542 (1966).

Installation of weapons of mass destruction on celestial bodies is prohibited in the first paragraph of Art. IV; see immediately below.

For a bibliography on the Outer Space Treaty, see S. H. Lay and H. J. Taubenfeld, The Law Relating to Activities of Man in Space at 328–330 (Chicago and London: Univ. of Chicago Press, 1970).

[25] "Installations" are added as specifically prohibited in this paragraph of the Outer Space Treaty.

in this context, "peaceful purposes" would not be interpreted to mean "non-military" purposes as in Article I of the Antarctic Treaty but rather non-aggressive purposes.[26] Such an interpretation, however, is not compelling[27] and it must be rejected as contrary to the underlying policy objective.

Even if one accepts—as one must—the broader "Antarctic-type" interpretation precluding any measures of an essentially military nature on the moon and other celestial bodies, the fact that so much of the space technology may be employed for both military and non-military purposes may still pose problems.[28]

In June, 1971, the Soviet Union submitted a draft of a new "Treaty Concerning the Moon" with a request that it be considered by the General Assembly.[29] This treaty would restate and clarify somewhat the "non-militarization" status of the moon.

[26] See J. E. S. Fawcett, International Law and the Uses of Outer Space at 34 (Dobbs Ferry, New York: Oceana Publications; and Manchester: Manchester Univ. Press, 1968). See also Meyer, "Der Weltraumvertrag," 16 Zeitschrift für Luftrecht und Weltraumrechtsfragen 65 at 69 (1967). Poulantzas, "The Outer Space Treaty of January 27, 1967, A Decisive Step Towards Arms Control, Demilitarization of Outer Space and International Supervision," 20 Revue Hellénique de Droit International 66 at 69 (1969), suggests that "peaceful" should be read as "non-armed."

[27] Consider the first sentence of the paragraph with the clause "exclusively for peaceful purposes" in the light of Art. I (exploration and use for the benefit and in the interest of all countries . . .) and second preambular paragraph ("exploration and use of outer space for peaceful purposes"). See to this effect Markoff, "La Notion 'Utilisation Pacifique' en Droit International Cosmique," Proc., 9th Colloquium on the Law of Outer Space, Oct. 14, 1966, Madrid, Spain at 170–171 (Davis, Cal.: Univ. of California School of Law, 1967).

The above interpretation would also hamper effective application of the provision, because the distinction between aggressive and non-aggressive (defensive) uses of systems may not be easy to draw, and the treaty fails to provide for settlement procedures in case of a dispute.

[28] McNaughton, "Space Technology and Arms Control" in Maxwell Cohen (ed.), Law and Politics in Space—Specific and Urgent Problems in the Law of Outer Space at 69 (Montreal: McGill University Press, 1964). Fawcett, note 26 above, at 35, correctly points to questionable drafting of paragraph two of Art. IV:

"It is perhaps a mistake to press these points of interpretation too far, but in an instrument of the supposed importance of the Outer Space Treaty, some care and precision of language may be expected. An oddity here is the omission of the Moon from the critical provision in Article 4 (2) prohibiting the establishment of military bases and so on. This provision as it stands covers only celestial bodies. Does this expression include the Moon in this context? Instead of a definitions clause, that might have been expected, the stock phrase 'outer space, including the Moon and other celestial bodies' is used twenty-two times in thirteen Articles, and its components are sometimes used separately. So in Article 4 (2) itself the expression 'the Moon and other celestial bodies' appears twice save in the central sentence, where the omission of the Moon must either be intentional, or an egregious mistake, only to be saved by saying that the whole tenor requires that the expression 'celestial bodies' in that sentence must include the Moon."

The treaty does not deal specifically with the interesting question of the legal status of non-military installations on the moon and celestial bodies. See, on this problem, generally, Brownlie, "The Maintenance of International Peace and Security in Outer Space," 40 Brit. Yr. Bk. Int. Law 1 at 27–28 (1964).

[29] U. N. Doc. A/8391, June 4, 1971.

(ii) Outer space proper

In dealing with outer space itself, the treaty deviates greatly from the Antarctic pattern, following a different model. It prohibits only *certain uses* of a *specified type* of weapon, instead of prescribing non-militarization. It provides in the first paragraph of Article IV that

> States Parties to the Treaty undertake not to *place in orbit around the earth* any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, install such weapons on celestial bodies, or *station* such weapons in outer space in any other manner.[30]

This clause might well be considered declaratory of international law as it evolved after 1957 and as it was approved unanimously by the General Assembly.[31] This provision, Bloomfield points out, realistically reflects the military opinion of the period: although both super-Powers could place thermonuclear weapons in orbit, "bombardment systems based on outer space [or for that matter on celestial bodies] are not as effective strategic tools as land-based (or sea-based) ballistic missiles."[32]

An argument has been advanced that Article IV, in conjunction with other provisions of the treaty, imposes "complete demilitarization of outer space,"[33] but such broad reading cannot be sustained.[34] Clearly, the article

[30] Emphasis added. In U. N. terminology the concept of "any other kinds of weapons of mass destruction" includes "lethal chemical and biological weapons." Thus, *e.g.*, the Commission for Conventional Armaments, established by the Security Council, adopted a resolution on Aug. 12, 1948, defining weapons of mass destruction to include atomic explosive weapons, radioactive material weapons, lethal chemical and biological weapons, and any weapons developed in the future which have characteristics comparable in destructive effect to those of the atomic bomb or other weapons mentioned above." United Nations, Resolution of the Commission for Conventional Armaments of Aug. 12, 1948, U. N. Doc. S/C.3/32, Aug. 18, 1948.

[31] General Assembly Res. 1884 (XVIII) of Oct. 17, 1963, U. N. GAOR, Supp. 15 at 13, U. N. Doc. A/5515 (1963); Fawcett, note 26 above, at 32. Darwin considers it relevant that this resolution, in contrast to Res. 1962 (XVIII) "does not claim to lay down legal principles." Darwin, note 24 above, at 288.

[32] Bloomfield in L. P. Bloomfield (ed.), Outer Space—Prospects for Man and Society at 125 (rev. ed., New York-Washington-London: Frederick A. Praeger, 1968). Deputy Secretary of Defense Cyrus R. Vance stated with reference to possible nuclear weapon systems in orbit: "Our studies show that these systems have technical and economic drawbacks in addition to safety and command disadvantages. They would, if deployed now be inaccurate, costly, and dangerous; and they would be less effective than present ICBM systems. Nevertheless, as technology advances, it is possible that some of these disadvantages could be eliminated." Treaty on Outer Space, Hearings before the Committee on Foreign Relations, U. S. Senate, 90th Cong., 1st Sess., on Exec. D, 90th Cong., 1st Sess., March 7, 13, and April 12, 1967, at 81.

[33] Ambrosini, "The Meaning of the Romantic Enunciations of Article I, §1 of the Space Treaty of January, 1967," in Further Outlook on Space (No. 11) at 6, speaks of "the *rule sanctioning* the complete demilitarization of outer space and of the celestial bodies" relying on "Articles I (para. 2), IX, X, XII, VIII, etc."; and *idem*, "The Space Treaty of 1967," *loc. cit.* (No. 10), at 7–9, relying on Art. IV.

[34] The legislative history indicates that both super-Powers intended to draw a distinction between the regimes for outer space and for celestial bodies and the other states were aware of this distinction. Mr. Azimi (Iran) pointed out in the Legal Subcommittee of the Committee on the Peaceful Uses of Outer Space that both the Soviet and U. S.

does not prohibit placing in orbit around the earth satellites or space stations having anti-missile, communications or other military functions as long as they do not carry nuclear or other mass destruction weapons.[35] Initially the Soviet Union decried as illegal the practice of reconnaissance satellites,[36] but the United States response has consistently been that space reconnaissance does not violate international law.[37] The Soviet Union's objections have subsided as its own reconnaissance satellites were developed.[38] Whatever the earlier arguments may have been, if "subsequent practice" by the super-Powers (as parties to the treaty) is taken into account, outer space reconnaissance is now established as legitimate. Fawcett goes so far as to suggest that reconnaissance satellites are "even perhaps in the interest of mankind in that they represent an efficient form of inspection of military activities, and the avoidance of inspection has always been a major obstacle to disarmament."[39] In fact, it is reasonable to assume that, without the possibility of deploying a satellite system for monitoring compliance, the United States would not have adhered to the Outer Space or the Test Ban Treaties.

The phrase "to place in orbit" is generally understood to require at least one complete circuit of the earth in a flight that is substantially unpowered.

---

drafts and working papers mentioned peaceful uses only of celestial bodies, but not peaceful uses of outer space, and suggested that outer space should be included by an amendment. No such amendment was made. Committee on the Peaceful Uses of Outer Space, Legal Sub-Committee, 5th Sess., 66th meeting, July 25, 1966, U. N. Doc. A/AC.105/C.2/SR.66 at 7 (1966). See also Mr. Rao (India) in 71st meeting, Aug. 4, 1966, U. N. Doc. A/AC.105/C.2/SR. 71 and Add. 1 at 8–9 (1966). On Art. IV, see N. M. Matte, Aerospace Law at 297–305 (London: Sweet & Maxwell Ltd.; Toronto: Carswell Co. Ltd., 1969); Goedhuis, "An Evaluation of the Leading Principles of the Treaty on Outer Space of 27th January 1967," 15 Nederl. Tijdschrift voor Intern. Recht 17 at 34–38 (1968); T. R. Adams, "The Outer Space Treaty: An Interpretation in Light of the No-Sovereignty Provision," 9 Harvard Int. Law J. 140 at 149 (1968); Cheng, "The 1967 Space Treaty," 95 Journal du Droit International 532 at 602 (1968).

[35] Hessellund-Jensen, "Some Problems Concerning the Creation and Implementation of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies," 38 Nordisk Tidsskrift for International Ret 97 at 110 (1968).

[36] U. N. Docs. A/AC.105/C.2/L.6 at 2 (1963); A/AC/105/C.2/L.1 at 2 (1962).

[37] U. N. Doc. A/AC.105/C.2/SR.7 (1962); Meeker, "Observation in Space," in Cohen, note 28 above, at 82. See, generally, McMahon, "Legal Aspects of Outer Space," 38 Brit. Yr. Bk. Int. Law 339 at 365–375 (1962); "Legal Aspects of Reconnaissance in Airspace and Outer Space," 61 Columbia Law Rev. 1074 at 1080–1082 (1961).

[38] Brennan, "Arms and Arms Control in Outer Space," in Bloomfield, note 32 above, at 161, reports that "Soviet officials at various levels up to former Premier Khrushchev have spoken in relaxed terms about U. S. reconnaissance satellites activities, and of their own activities of similar kind."

[39] Fawcett, note 26 above, at 33. Brennan, *loc. cit.* note 38 above, at 163–164, points out that it is important that each major Power have a reasonably accurate inventory information on the strategic force levels of the other to avoid exaggerated estimates and counter-actions. However, it is difficult to obtain such information through reconnaissance satellites without also obtaining targeting information (*i.e.*, location of weapons and carriers) and this increases the vulnerability of the forces. The United States unilaterally deployed a system of satellites for monitoring compliance with the prohibition of testing in outer space at a cost of at least $200 million. *Ibid.* at 176.

It does not include intercontinental ballistic missiles (ICBM),[40] and it was probably not intended to ban the so-called fractional orbit bombardment systems (FOBS), land-based Soviet developed systems designed to perform the same strategic function as ICBMs.[41] Research and development of orbital nuclear weapon systems are also not prohibited, although deployment of nuclear warheads in outer space or their inclusion in deep space probes clearly would be.

The treaty does not contain a definition of what constitutes "outer space." This omission was deliberate in view of the evolving technology and absence of general agreement. Since the freedom of satellite overflight has now been established as a rule of international law, no difficulty has arisen thus far as a result of the absence of this definition.[42]

(c) Seabed Treaty

(i) Basic obligations

Like the Outer Space rules, the Seabed Treaty prohibits only *specified* uses of *specified* weapons in a *specified* environment, but the scope of the prohibition is broader than the outer space prohibition, since it comprises not only the weapons themselves but certain delivery and auxiliary facilities as well. More specifically, the treaty binds the parties "not to emplant or emplace"[43] nuclear weapons or other weapons of mass destruction, as well as "structures, launching installations or any other facilities specifically designed for storing, testing or using such weapons" on "the sea-bed and the ocean floor and in the subsoil thereof" beyond a 12-mile zone contiguous to the coast.[44]

Several General Assembly resolutions had set forth as an objective the preservation of the deep seabed "exclusively for peaceful purposes" and

[40] An ICBM normally does not go into orbit, but rather follows a ballistic trajectory with a typical apogee of 500–800 miles above the surface of the earth. M. Willrich, Non-Proliferation Treaty: Framework for Nuclear Arms Control at 57 (Charlottesville, Va.: The Michie Co., 1969).

[41] Bloomfield in Bloomfield, note 32 above, at 125. "[T]he vehicle launched in a FOBS mode is fired into very low orbit about 100 miles above the earth, and at a given point in time, rockets are fired to bring the vehicle out of orbit. The vehicle is not intended to orbit completely around the earth." Willrich, note 40 above, at 57. An effort by the Italian Representative to establish an interpretation of illegality of "semi-orbital" weapons did not seem to have been successful. See U. N. Doc. A/7221 (Sept. 10, 1968) and the statement by Representatives of the United States, United Kingdom and U.S.S.R. in 23rd Session of the General Assembly, U. N. Doc. A/BUR/SR.175 (Oct. 17, 1968); Ambrosini, "The Space Treaty of 1967," Further Outlook on Space (No. 10) at 8.

[42] See statements by U. S. Secretary of State Rusk and Ambassador Goldberg in Hearings before the Committee on Foreign Relations on Outer Space Treaty, note 32 above, at 17–18. Brennan, in Bloomfield, note 32 above, at 154, speculates about future problems with possible aerospace planes, capable of taking off from a more or less conventional airport, using wings for airlift and gradually flying higher until they are in orbit. He sees possible problems under the treaty if they came to be used in anything like global flight patterns for exercise or other purposes.

[43] The difference between "emplant" and "emplace" was never explained. These words appeared in the very first drafts of the treaty.

[44] Art. I (1).

for the benefit of all states.[45] The above treaty text fixed by the super-Powers, however, represents a compromise between the Soviet proposal for a full "non-militarization" of the deep seabed outside the 12-mile contiguous zone (analogous to the regime of the Antarctic and celestial bodies) and the American proposal for reducing the exempted zone to 3 miles but confining the prohibition to weapons of mass destruction and "associated fixed launching platforms."[46] The Soviet Union apparently aimed at forcing the removal of defensive mines and submarine detection devices that the United States had emplaced to track the growing Soviet submarine fleet. Despite strong support from other states for a broad prohibition of both conventional and nuclear weapons, the Soviet Union accepted the American limited version as a *quid pro quo* for American acceptance of the wider (12-mile) exempted offshore zone.[47]

The 12-mile "sea-bed zone" is defined by means of "incorporation by reference" of the description of the contiguous zone in the Geneva Convention on the Territorial Sea and the Contiguous Zone.[48] Within this zone, the treaty prohibitions do not apply "either to the coastal state or to the sea-bed beneath its territorial waters." This obscure clause means that a coastal state remains free, if it is able and wants to do so, to emplace weapons of mass destruction within the *entire 12-mile zone* adjacent to its coast, even if it claims a territorial waters zone of a lesser width; in addition, any other state party to the treaty would be free, with the consent of such coastal state, to emplace such weapons within the latter's *territorial waters zone* (the so-called "allied option").[49]

[45] General Assembly Res. 2340 (XXII), Supp. 16 at 14, U. N. Doc. A/6716 (1967); see, generally, Stoever, "The 'Race' for the Seabed: The Right to Emplace Military Installations on the Deep Ocean Floor," 4 The Int. Lawyer 560 at 564–568 (1970); Pfeiffer, "Zur Frage eines internationalen Abkommens über die Begrenzung der Meeresbodenrüstung," 24 Europa Archiv 581 (1969); Kalinkin, "Military Use of the Sea-bed Should Be Banned," 1969 International Affairs (Moscow) 45 (No. 2).

[46] The arguments on both sides are conveniently summarized by Mr. Husain of India in ENDC/PV.428 at 5–8 (Aug. 14, 1969).

[47] C. M. Roberts, The Nuclear Years—The Arms Race and Arms Control, 1945–70, at 111 (New York-Washington-London: Frederick A. Praeger, 1970). See also "U. S.-Soviet Accord Barring Atom Arms on Sea-bed Reported," New York Times, Oct. 7, 1969 at C 2 (L 2), cols. 5–6.

[48] Art. II. The reference to the Geneva Convention (516 U.N.T.S. 205; [1964] 15 U.S.T. 1606) was criticized by a number of states: The contiguous zone in the convention is a surface criterion applying to superjacent waters and not to the seabed or subsoil. Moreover, as a practical matter, what would happen if the Geneva Convention were terminated, were differently interpreted, or were amended in the relevant articles? Only a minority (less than 30) of states have ratified the convention. SIPRI, Yearbook of World Armaments and Disarmament 1969/70 at 166–167 (Stockholm, London, New York, New Delhi: Almquist and Wiksell, 1970). In order to assure that the differing positions of states parties to the treaty would not be affected by the reference to the convention, a separate Art. IV was inserted containing a disclaimer of such sweeping proportions that, "if taken literally, [it] may contradict the very sense of the treaty." *Ibid.* at 168.

[49] The Soviet Union apparently meant to deny the possibility of the "allied option" mentioned above, CCD/PV.492 at 8 (1970). The United States took the view that the exemption would not "in itself constitute granting of permission for the emplacement of

In addition to the principal prohibition, the parties undertake not to assist "any State" in carrying out the prohibited activity nor to participate in such activity in any other way.[50]

(ii) What is included?

Since the treaty language describing the object of the prohibition was vague, the members of the Disarmament Committee asked for[51] and obtained some interpretive explanations from the sponsoring super-Powers. Thus the sponsors made it clear that the treaty prohibits nuclear mines anchored in the seabed. It does not, however, apply to facilities for research or for commercial exploitation not specifically designed for storing, testing or using weapons of mass destruction. The coincidence of the evolving technology for non-military and military uses posed a problem in this as in other fields.[52] No clarification was offered for the case of facilities that were not specifically designed for nuclear weapons use but were later adapted to serve some such use.[53] Although the word "fixed" (which had been used in the United States draft to describe nuclear weapons and launching platforms) was dropped, the actual scope of the banned activities remained unclear, and a number of states sought further clarification of the phrase "emplant or emplace."[54] In response to this query, it was explained that submarines and submersible vehicles able to navigate in the water above the seabed and designed to carry nuclear weapons are considered to be like any other ship and would not be violating the treaty, even if anchored to, or resting on the bottom. Nevertheless, bottom-crawling vehicles ("creepy-crawlers"), which can move only when in contact with the seabed and which are specifically designed to use nuclear weapons, are prohibited.[55] Finally, it was made clear that the treaty does not prohibit such peaceful uses of nuclear energy as nuclear reactors, sci-

---

weapons of mass destruction within such territorial sea." *Ibid.* at 13. Mexico noted the possible interpretation that would allow the "allied option" and expressed the view that if the phrase "or the sea-bed beneath its territorial waters" were to have any meaning of its own (apart from the possible "allied option" interpretation) and if it is not a mere repetition of the prior phrase exempting the coastal state within the adjacent 12-mile zone, then the phrase must refer to situations where the territorial waters are wider than the 12-mile zone. Thus it could be interpreted as authorizing a state to emplace weapons of any kind within an area extending as much as 200 miles, if its territorial waters go that far. CCD/PV.477 at 13–15 (1970). This interpretation was rejected by the United States, which declared that the exemption for the coastal state applied only "with respect to the sea-bed beneath the territorial sea within the sea-bed zone," not to any part beyond the 12-mile zone. CCD/PV.492 at 13 (1970).

[50] Art. I (3): "not to assist, encourage or induce any State to carry out activities referred to in paragraph 1 of this article and not to participate in any other way in such actions." The Non-Proliferation Treaty, Art. I, and the Test Ban Treaty, Art. I (2), served as model.

[51] Poland in ENDC/PV.406 at 809 (April 24, 1969); SIPRI, note 48 above, at 160.

[52] CCD/PV.440 at 9 (Oct. 7, 1969). [53] SIPRI, note 48 above, at 160.

[54] *E.g.*, United Kingdom in CCD/PV.444 at 22 (Oct. 21, 1969).

[55] United States, CCD/PV.440 at 9 (Oct. 7, 1969) and CCD/PV.444 at 44 (Oct. 21, 1969). Since not only fixed but certain mobile facilities are prohibited, the use of words "emplant or emplace" does not seem to be proper. What about nuclear mines originally emplanted on the seabed but later allowed to float?

entific research and peaceful nuclear explosions. When a number of members of the Disarmament Committee pointed out that the Test Ban Treaty had prohibited all nuclear explosions under water and that the Seabed Treaty would not affect this ban,[56] the sponsors declared that the latter treaty would not affect obligations under other arms control measures.[57]

(iii) The impact?

The Seabed Treaty, like the other collateral measures, reflects strongly the strategic considerations of the super-Powers, especially those of the United States. Of the two super-Powers, that country is further advanced in submarine technology and has an easier access to oceans than the Soviet Union.

The treaty has been represented as barring mass-destruction weapons on "nearly 70 per cent of the earth's surface."[58] It must be kept in mind, however, that neither super-Power has considered the stationing of such weapons on the seabed as strategically useful, mainly because they would be more vulnerable there than on submarine vehicles. On the other hand, due to their relative invulnerability, submarines with Polaris/Poseidon-type missiles equipped with nuclear warheads have become a crucial component in the strategic deterrent of both super-Powers. These submarines are not excluded by the treaty. New submarine systems (currently in the planning stage) would be armed with longer-range missiles and would be even less targetable since they would be able to operate at greater depths and use virtually the entire ocean volume.[59]

As improved technology makes deep seabed exploitation economical, significant economic interests may come into play. Thus, for instance, the allocation of oil leases will have to be reconciled with the continuing freedom of states to place military installations other than mass-destruction weapons facilities anywhere on the ocean floor.[60]

2. *Restraints Not Confined to Specific Environment: Test Ban, Non-Proliferation, Chemical and Bacteriological (Biological) Warfare*

(a) Test Ban Treaty: From "partial" to "comprehensive" ban?

As originally conceived, the Test Ban Treaty was to comprise all environments. It was only in the final stage of the negotiations that the "underground" was excluded at the suggestion of the United States and the United Kingdom, since the Soviet Union was unwilling to agree to the number of

[56] Netherlands, CCD/PV.440 at 9 (Oct. 7, 1969); U.A.R., CCD/PV.445 at 36 (Oct. 23, 1969).

[57] SIPRI, note 48 above, at 162.

[58] U. S. Arms Control and Disarmament Agency, 10th Annual Report to Congress, Jan. 1, 1970–Dec. 31, 1970, at 9.

[59] SIPRI, note 48 above, at 96–97. At present submarines operate usually at 1,000 feet and not more than 2,000–3,000 feet. A submersible vehicle capable of operating at 20,000 feet could use 95% of the entire ocean volume.

[60] *Ibid.* at 106. On the relation between the Seabed Treaty and the U. S. proposal for a Convention on the International Seabed Area, see Auburn, "The International Seabed Area," 20 (2) Int. and Comp. Law Q. 173 at 190 (1971).

on-site inspections on its territory that the other two nuclear Powers considered indispensable for reliable verification. The treaty is discussed in this section because of its origin, and on the optimistic assumption that it will eventually be extended to the remaining environment, in accordance with the intention formally stated in the treaty itself.

The treaty now prohibits not only nuclear weapon test explosions but also any other nuclear explosions, in the atmosphere, in outer space, or under water (Article I (1)(a)), that is, in those environments where detection from outside the territory of the detonating state is possible. Underground nuclear explosions are not prohibited as long as they do not cause radioactive debris to be present outside the territorial limits of the state under whose jurisdiction or control such explosions are conducted (Article I (1)(b)). The parties also undertake to refrain from "causing, encouraging, or in any way participating in the carrying out of" the prohibited explosions (Article I (2)).[61]

(i) "[A]ny other nuclear explosion": the "Plowshare" program

The Anglo-American draft would have exempted "explosions for peaceful purposes" from the prohibition, if they were unanimously agreed to by the three "Original Parties" (Soviet Union, United Kingdom, and United States) and if they were carried out in accordance with specified rules. The United States was anxious to preserve its "Plowshare" program for peaceful application of nuclear explosions. This program has comprised experimental projects, such as recovery by nuclear explosions of oil and gas, creating cavities for storing gas, development of water resources, excavating canals and harbors or mountain passes and changing the course of rivers. Since the Soviet Union objected to exempting peaceful explosions on the ground that they could be used to evade the weapon test ban, the Western partners abandoned the exemption.[62]

[61] The full text of Art. I reads as follows:

"1. Each of the Parties to this Treaty undertakes to prohibit, to prevent, and not to carry out any nuclear weapon test explosion, or any other nuclear explosion, at any place under its jurisdiction or control:

(a) in the atmosphere; beyond its limits, including outer space; or underwater, including territorial waters or high seas; or

(b) in any other environment if such explosion causes radioactive debris to be present outside the territorial limits of the state under whose jurisdiction or control such explosion is conducted. It is understood in this connection that the provisions of this subparagraph are without prejudice to the conclusion of a treaty resulting in the permanent banning of all nuclear test explosions, including all such explosions underground, the conclusion of which, as the Parties have stated in the Preamble to this Treaty, they seek to achieve.

"2. Each of the Parties to this Treaty undertakes furthermore to refrain from causing, encouraging, or in any way participating in, the carrying out of any nuclear weapon test explosion, or any other nuclear explosion, anywhere which would take place in any of the environments described, or have the effect referred to, in paragraph 1 of this Article."

See generally Schwelb, "The Nuclear Test Ban Treaty and International Law," 58 A.J.I.L. 642 (1964) and the literature cited therein.

[62] For a comparison of the U. S.-U. K. draft and the text of the treaty, see Nuclear Test Ban Treaty, Hearings before the Committee on Foreign Relations, U. S. Senate, 88th Cong., 1st Sess., on Exec. M, 88th Cong., 1st Sess., Aug. 12–15, 19–23, 26–27, 1963,

Although the treaty is silent on the point, there appears to be a consensus in the United States and in the Soviet Union that it does not deal with or prohibit the use of nuclear weapons in war.[63]

(ii) Underground explosions

The clause relating to underground explosions[64] was written in its present form for a number of reasons. One reason was that, in the absence of any provision for aircraft sampling flights over the territories of signatory states, weapon tests could be reliably detected and identified only if radioactive debris escaped beyond the territorial limits of the state where the tests were conducted.[65] A second reason was to prevent any state party to the treaty from evading the ban by throwing a shovelful of dirt over a nuclear device and claiming that it was underground. Finally, any underground explosion, however deeply set, may "vent" at least some quantities of radioactive gases and even particles into the atmosphere. In fact, every excavatory or cratering explosion, the possibility of which has been actively investigated as part of the peaceful uses program by both super-Powers, will presumably vent radioactive particles and could cause harmful contamination outside the testing state's territory.[66] Thus, such "peaceful-uses" explosions and, of course, underground weapon test explosions as well, would be in violation of the treaty if radioactive particles drifted across a national frontier. This general language of the treaty does not indicate what quantity of such particles and what resultant effects would constitute "the presence of radioactive debris" beyond the borders in violation of the treaty.[67]

---

at 814–816. The Soviet Union was suspicious that under the guise of peaceful uses the West was going to conduct advance weapon tests since there was no difference in the advancement of basic technology between the two uses. Hearings, *ibid.* at 822. See also H. K. Jacobson and E. Stein, Diplomats, Scientists and Politicians—the United States and the Nuclear Test Ban Negotiations at 409–412 (Ann Arbor, Mich.: Univ. of Michigan Press, 1966).

[63] Schwelb summarized the interpretation as it was developed during the hearings before the U. S. Senate Committee on Foreign Relations: The words "or any other nuclear explosions" were inserted for the sole purpose of banning peaceful-use explosions that would have been exempted in the U. S.-U. K. draft. The title and the Preamble speak of *tests*. The purpose and general scheme of the treaty are inconsistent with a contrary interpretation. The subsequent resolutions by the General Assembly and the statement by the Secretary General calling for a conference for signing a convention on the prohibition of the use of nuclear weapons for war purposes would be unnecessary if the Test Ban Treaty itself contained such prohibition. The above conclusion is confirmed by contemporaneous interpretations given by President Kennedy, Premier Khrushchev and others. Schwelb, "The Nuclear Test Ban Treaty and International Law," note 61 above, at 643–646; Chayes, Ehrlich, Lowenfeld, International Legal Process at 1008–1013 (Boston: Little, Brown and Co., 1968).

[64] Art. I (1) (b), see text in note 61 above.

[65] Jacobson and Stein, note 62 above, at 410.

[66] Jacobson and Stein, note 62 above, at 410; Chayes *et al.*, note 63 above, at 1024; Secretary of State Rusk in Hearings on Nuclear Test Ban Treaty, note 62 above, at 35. However, the Soviet Union is reported to have "solved" the radiation problem in this connection. Hamilton, "Madagascar Asks for Atomic Advice," New York Times, Sun., Dec. 12, 1971, at 28, col. 1.

[67] Two criteria have been suggested: "contamination" of an area beyond the borders

As far as the United States Plowshare program was concerned, the authoritative view at the time of the conclusion of the treaty was that the development of the planned devices and scientific studies with applications in mining and water resource development could proceed under the treaty, since they could be carried out at great depth, involving the release of very little, if any, radioactivity. In the excavation application, however, the amount of radioactivity reaching the atmosphere would be likely to cause a violation of the treaty. Thus the treaty might prevent employment of nuclear devices in such projects as digging an Isthmic Canal across the Isthmus of Panama or building a harbor in Alaska. If and when this type of technology is perfected and becomes economical, the parties would have to consider amending the treaty so that the technology could be put to effective application.[68] In an interesting reversal of its position, the Soviet Union, which has made considerable progress in its own Plowshare-type program (while the United States has reduced funds for its program), now reportedly desires a "liberal" interpretation of the treaty that would allow surface excavation.

(iii) "[J]urisdiction or control"

The drafters faced some difficulties in fitting the prohibition into the differing legal regimes that govern the various environments concerned. In the basic clause of Article I each party undertakes to refrain from nuclear explosions

> at any place under its jurisdiction or control: (a) in the atmosphere; beyond its limits, including outer space; or under water, including territorial waters or high seas. . . .

As Schwelb points out, the awkward wording implies that a part of outer space or of the high seas can be a "place" under the "jurisdiction or control" of a state for the purposes of the treaty. The phrase "including outer space" was inserted to prevent any implication that there was an area which was neither "atmosphere" nor "outer space"; and the words "including . . . high seas" were to remove the doubt that underwater tests on the high seas were also prohibited. The assumption was that the testing state would have at least temporary control of the outer space or high sea area where the test was being conducted.[69] The words "under water, including territorial waters or high seas" clearly include internal waters and inland lakes.[70]

---

or injury to health; and "detectability," that is, the amount of actual radioactive debris that can be detected in sufficient detail so that it can be identified and its origin determined. Chayes *et al.*, note 63 above, at 1026–1028.

[68] Dr. Glenn T. Seaborg, Chairman of the U. S. Atomic Energy Commission in Hearings on the Nuclear Test Ban Treaty, note 62 above, at 211; Secretary of Defense McNamara, *ibid.* at 181–182. See generally Brooks and Myers, "Plowshare Evaluation," in B. Boskey and M. Willrich (eds.), Nuclear Proliferation: Prospects for Control at 37–101 (New York: The Dunellen Co., 1970).

[69] Opinion of the Legal Adviser of the U. S. Department of State in Hearings on Test Ban Treaty, note 62 above, at 61–62; 58 A.J.I.L. 175–76 (1964); Schwelb, "The Nuclear Test Ban Treaty and International Law," note 61 above, at 647–648. Under water is clearly above ground, not under ground. Only the ban of underground explosions is reserved by the Preamble and Art. I (1) (b) for regulation in a later treaty.

In the clause prohibiting underground explosions if they cause debris to be present outside the territorial limits "of the State *under whose jurisdiction or control*" such explosions are conducted, the italicized words also cover trust and non-self-governing territories administered by such a state, territories under its military occupation (belligerent or otherwise) and any type of control situation (such as Berlin).[71] If a state, party to the treaty, were to undertake an excavation of a canal on the territory of another state not party to the treaty, the explosions clearly would be under the first state's "control." Finally, explosions in the subsoil of the high seas, if they were technically feasible, would obviously be underground.

(iv) "[T]o refrain from causing, encouraging, or in any way participating in, the carrying out of any . . . explosion. . . ."

This clause, which contains an auxiliary or supplementing obligation, has raised some questions of interpretation. For instance, do nuclear-weapon Powers have to modify their assistance to peaceful nuclear programs in other countries which conduct weapon tests? The United States did not renew the agreement for co-operation in peaceful uses of nuclear energy with France, apparently for reasons other than the treaty,[72] but it was faced with other problems in dealing with that friendly state. Thus, the United States had to determine whether it would infringe the above clause if it should grant transit, landing or refueling rights to a French jet tanker flying from metropolitan France to Tahiti, from where France conducted its nuclear tests. The authorization was issued when France gave assurances that the plane cargo "did not include nuclear material or components but rather consisted of naval stores."[73] A similar but "more troublesome" issue has arisen in cases of French purchases of American equipment (such as computers) that could be used directly in developing, manufacturing or testing nuclear weapons.[74]

(v) Impact of the Treaty

The Test Ban Treaty was the first, and thus far has remained the only, collateral measure that has compelled three of the five nuclear Powers (the Soviet Union, the United Kingdom and the United States) to desist, albeit not entirely, from a significant weapon activity in which they had been previously engaged. However, the treaty has not prevented France or China from testing in the atmosphere, since the two states did not adhere to it. The treaty became realizable only after both super-Powers had amassed so much information from earlier tests that, in the opinion of some

[70] Schwelb, note 61 above, at 648, correctly argues that there is no reason why "under water" should, contrary to its natural and ordinary meaning, not be understood to cover also waters which do not form part of territorial waters or high seas.

[71] P. Chandrasekhara Rao, "The Test Ban Treaty, 1963: Form and Content," 3 Indian J.I.L. 315 at 317 (1963).

[72] According to newspaper reports, the reason was the decision by the United States to channel its civil nuclear assistance through EURATOM, of which France is a member. Chayes *et al.*, note 63 above, at 1051.

[73] New York Times, Dec. 6, 1964, reprinted in Chayes *et al.*, note 63 above, at 1052.

[74] See, generally, the New York Times, Dec. 19, 1964, reprinted in Chayes *et al.*, note 63 above, at 1052–1053.

but not all the experts, further testing in the atmosphere at any rate was no longer essential. Finally, the treaty commitment itself is brittle in view of the unprecedented withdrawal clause[75] which would allow a party to resume testing on short notice. Above all, it is obvious that the treaty has not brought about a slow-down in the nuclear arms race and it has certainly not put a stop to weapon testing.

Nevertheless, it would be unwise to dismiss the treaty commitment as insignificant. In the first place, the super-Powers are precluded from operational tests of new nuclear weapon systems, including the ballistic missile systems, and this has added somewhat to the inherent uncertainty concerning their effectiveness. Second, by confining the testing of any party to the "costly and time consuming underground environment," the treaty set a certain barrier which was bound to retard at least in some measure the pace of nuclear weapon proliferation.[76] Third, the treaty has substantially reduced radioactive contamination.[77] Finally, the treaty commits the parties "to seek to achieve" agreement on extending the ban to underground tests in order to make it comprehensive. Currently, however, there is no indication of immediate progress in this direction, despite advancement in technology for detection and identification of underground explosions without on-site inspection.

Since the treaty was concluded, both super-Powers have conducted a large number of underground tests.[78] Once above-ground testing had been prohibited, American and Soviet scientists, according to Roberts, developed techniques to try out devices both more powerful and, as in the case of Antiballistic Missiles and Multiple Independently-Targeted Re-entry Vehicles (MIRV), more sophisticated than had previously been employed underground.[79] It is therefore apparent that the limitation of weapon testing to the underground has proved a much lesser restraint than was anticipated.

[75] Art. IV. I discuss this clause in the study cited in the initial footnote above.

[76] This purpose would of course be attained later by the Non-Proliferation Treaty. However, some states which became parties to the Test Ban Treaty did not sign or ratify the Non-Proliferation Treaty (*e.g.*, India, Brazil, Chile, South Africa, Spain).

[77] Willrich, note 40 above, at 54–55.

[78] "The United States publicly announced 233 nuclear tests between the beginning of the Limited Test Ban Treaty, August 5, 1963, and June 30, 1971. The Soviet Union announced only three of their tests during this period. The United States announced 30 seismic events which were centered in a Soviet nuclear test area as suspected nuclear tests during the same period. It is U. S. policy, however, not to announce all U. S. tests or all suspected USSR tests." Prospects for Comprehensive Nuclear Test Ban Treaty, Hearings before the Subcommittee on Arms Control, International Law and Organization of the Committee on Foreign Relations, U. S. Senate, 92d Cong., 1st Sess., July 22 and 23, 1971, at 128.

In 1962, the Soviet Union ended up ahead of the United States in the development of large-yield multi-megaton warheads, while the United States had an edge in smaller explosives with a higher yield-weight ratio. An argument was made in the United States that the Test Ban Treaty enables the Soviet Union to "catch up" with the United States in smaller explosives while making it impossible for the United States to reach the level of Soviet technology in multi-megaton weapons.

[79] Roberts, note 47 above, at 110.

Some of the tests carried out after the treaty had come into force emitted radioactivity into the atmosphere and, in a few of these cases, radioactive debris drifted into Canada from the United States, and into China and Japan from the Soviet Union. Both the United States and the Soviet Union exchanged notes and questioned each other as to the circumstances of these incidents; although suggestions of treaty violations were made, they were not pressed, presumably because of the limited amount of the detected debris and the "accidental" nature of the "venting."[80] Sweden is also reported to have questioned both Powers in connection with these incidents.[81]

(b) Non-Proliferation Treaty

If the Test Ban Treaty restrains *all* states from a *specified* activity with respect to *specified* weapons and devices (nuclear weapon test and other nuclear explosions), the Non-Proliferation Treaty in essence restrains a *certain category* of states ("non-nuclear weapon states") from *any* activity with respect to *specified* weapons and devices (nuclear weapons and other nuclear explosive devices), including their acquisition and possession.

(i) Basic obligations

Article I of the Non-Proliferation Treaty sets forth the obligations of "nuclear-weapon states" which are defined as those which have "manufactured and exploded a nuclear weapon or other nuclear explosive device prior to January 1, 1967."[82] These include the Soviet Union, the United Kingdom and the United States, as well as China and France. All other states are referred to as "non-nuclear-weapon states." The nuclear-weapon states undertake *first,* not to "transfer" nuclear weapons or "control" over nuclear weapons "to any recipient whatsoever"; *second,* not "to assist, encourage, or induce" non-nuclear-weapon states to "manufacture or otherwise acquire" nuclear weapons; *third,* these undertakings apply not only to nuclear weapons, but also to "other nuclear explosive devices."[83]

Article II deals with the undertakings of *non-nuclear-weapon states* and "it is almost the mirror reflection of Article I."[84] Non-nuclear-weapon states undertake *first,* not to receive "the transfer" of nuclear weapons or control over them from "any transferor whatsoever"; *second,* and probably more important, not to "manufacture or otherwise acquire" nuclear weapons, or "seek or receive any assistance" in such manufacture; *third,* as in Article I,

[80] Several of these incidents are described in Chayes *et al.,* note 63 above, at 1039–1043.

[81] Washington Post, May 4, 1971, at A 15, reports that Sweden questioned the United States in connection with a 1968 underground nuclear test in Nevada which, Stockholm claimed, vented detectable radiation.

[82] Art. IX (3).

[83] Art. I: "Each nuclear-weapon State Party to the Treaty undertakes not to transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly, or indirectly; and not in any way to assist, encourage, or induce any non-nuclear-weapon State to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices, or control over such weapons or explosive devices."

[84] Bunn, "Horizontal Proliferation of Nuclear Weapons" in Boskey and Willrich, note 68 above, at 31. See also Bunn, "The Nuclear Non-Proliferation Treaty," 1968 Wis. Law Rev. 766 at 771; Firmage, "The Treaty on the Non-Proliferation of Nuclear Weapons," 63 A.J.I.L. 711 at 722 (1969).

the undertakings apply not only to nuclear weapons, but also to "other nuclear explosive devices."[85]

Finally, in Article III non-nuclear-weapon states undertake to accept an international safeguards system for all their peaceful nuclear programs, and there is a corresponding undertaking on the part of all states not to supply specified materials and equipment without the safeguards on the materials.

(ii) "[N]uclear weapons"—"other nuclear explosive devices": a case of missing definitions

Like the Test Ban Treaty, the Non-Proliferation Treaty fails to offer a definition of its basic operational concepts. "Nuclear weapons" clearly include a nuclear bomb carried in a strategic bomber or a nuclear warhead on the tip of an ICBM. On the other hand, the drafters apparently intended to exclude nuclear delivery systems such as missiles or aircraft designed to carry nuclear weapons, and military propulsion systems such as they exist in nuclear-powered submarines or warships.[86]

The undefined phrase "other nuclear explosive devices" in Articles I and II is intended primarily to cover "Plowshare" devices producing the type of "nuclear explosions" for peaceful purposes that are dealt with by the Test Ban Treaty together with weapon-test explosions. In order to avoid weapon proliferation, nuclear devices developed for peaceful purposes are

[85] Art. II: "Each non-nuclear-weapon State Party to the Treaty undertakes not to receive the transfer from any transferor whatsoever of nuclear weapons or other nuclear explosive devices or of control over such weapons or explosive devices directly, or indirectly; not to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices; and not to seek or receive any assistance in the manufacture of nuclear weapons or other nuclear explosive devices."

[86] This was an interpretation offered by the United States and not rejected by the Soviet Union. Willrich, note 40 above, at 69 and 284, note 3. The treaty does not distinguish between offensive nuclear warheads and defensive nuclear warheads associated with ABM defense systems. The prohibitions in Arts. I and II apply to both.

Only the Treaty of Tlatelolco contains the definition of a "nuclear weapon." Art. 5 of that treaty defines "nuclear weapon" as "any device which is capable of releasing nuclear energy in an uncontrolled manner and which has a group of characteristics that are appropriate for use for warlike purposes. An instrument that may be used for the transport or propulsion of the device is not included in this definition if it is separable from the device and not an indivisible part thereof."

"Much of this language seems to have been derived from the United States Atomic Energy Act which defines 'atomic weapon' as 'any device utilizing atomic energy, exclusive of the means for transporting or propelling the device (where such means is a separable and divisible part of the device) the principal purpose of which is for use as, or development of, a weapon, a weapon prototype, or a weapon test device.'

"Thus, the definitions in both the Treaty of Tlatelolco and the United States legislation expressly exclude nuclear delivery and propulsion systems. An important difference between the definitions is that the United States legislation includes a subjective element of purpose, the intended 'use' for the device in a nuclear weapons program, while the Latin American definition is not dependent on the intended purpose for which the device will be used, as long as it possesses a 'group of characteristics' which make it 'appropriate' for use as a nuclear weapon. Hence, Plowshare devices might be excluded from the definition of nuclear weapons under United States law, but would seem to be included in the Treaty of Tlatelolco." Willrich, *ibid.* at 68.

treated like nuclear weapons, since materials used for such devices could be employed for weapon purposes. As a United Kingdom representative said, a device which could move "a million tons of earth to dig a canal . . . could just as easily pulverize a city of a million people." [87] Nevertheless, it was this feature of the treaty, a guarantee of "super-Power duopoly" with respect to acquisition of peaceful nuclear explosion technology, that proved most objectionable to a number of states. In fact, Brazil has refused to accept a prohibition on manufacturing or receiving peaceful nuclear devices even though it appears to be also written into the Treaty of Tlatelolco.[88]

It should be noted that, whereas the Test Ban Treaty permits all states to carry out underground non-venting nuclear explosions for weapon or peaceful purposes, the Non-Proliferation Treaty deprives non-nuclear-weapon states of this right while preserving it for the nuclear-weapon states.

(iii) "[C]ontrol over . . . weapons or explosive devices": the end of MLF

The prohibition of transfer of control over weapons means that nuclear-weapon states cannot give up physical custody of their nuclear weapons or provide sufficient access to the weapons so that they could be taken away by anyone else; nor can nuclear-weapon states give up their power to make the final decision on firing their weapons.[89] The lack of agreement on the provision concerning control or, as the Soviet Union puts it, "access" to the weapons was a major reason why the conclusion of the treaty was delayed by almost two years. At issue was the rôle of non-nuclear members of military alliances, principally the Federal Republic of Germany. Actually, a major purpose of the Soviet Union in seeking the treaty was to assure that the Federal Republic be barred from nuclear weapons.[90] The

[87] Bunn, in Boskey and Willrich, note 68 above, at 31.

[88] Brazil maintains, as Willrich reports (note 40 above, at 70–71), "that the Treaty of Tlatelolco 'draws a clear cut distinction' between peaceful nuclear explosives and nuclear weapons.

"The United States and some of the Latin American states have taken repeated exception to such an interpretation. The Treaty of Tlatelolco permits the parties to 'carry out explosions of nuclear devices for peaceful purposes—including explosions which involve devices similar to those used in nuclear weapons . . . provided that they do so in accordance with . . . articles 1 and 5.'

"However, in light of the definition of nuclear weapons in Article 5, discussed above, the United States has interpreted the Treaty of Tlatelolco as in effect 'prohibiting the contracting parties from acquiring or testing nuclear explosive devices for peaceful purposes . . . unless someone can some day invent a nuclear explosive which cannot be used as a nuclear weapon . . . .'

"The Soviet Union has been as unyielding as the United States with respect to the transfer of peaceful nuclear explosive devices, although it has been understandably less concerned than the United States about the impact of its position on relations with the Latin American states."

Brazil ratified the Tlatelolco Treaty subject to preconditions that have not been met and thus is not bound by the treaty. See Art. 28 of the Tlatelolco Treaty, note 13 above.

[89] Bunn, in Boskey and Willrich, note 68 above, at 31.

[90] The Federal Republic is committed by the Treaty of Brussels of Oct. 23, 1954, "not to manufacture on its territory atomic, biological and chemical weapons." Art. I,

United States has deployed some seven thousand nuclear warheads in Western European non-nuclear-weapon states with a preponderance in West Germany, but all of these warheads are owned by the United States and physically held by American forces. Between 1963 and 1966 the United States and its NATO Allies had been exploring a proposal for the so-called Multilateral Nuclear Force (MLF) of jointly owned and controlled seagoing surface vessels; initially, the United States was to retain control of the nuclear weapons earmarked for this Force, but the door would have been left open for eventual joint control by the European allies, including West Germany. Agreement on the compromise text in Articles I and II of the Non-Proliferation Treaty became possible only after the MLF proposal was discarded. According to the interpretation which was worked out by the United States and the other NATO states and transmitted to the Soviet Union, a transfer of nuclear weapons control such as was contemplated by MLF is barred by the treaty. The treaty, however, would not preclude a United States of Europe (if such a new entity should emerge at the end of the current integration process) from "inheriting" nuclear weapons (presumably French and British) by "succession," since such succession would not constitute a "transfer."[91] Similarly, the treaty does not affect the existing arrangements for deployment of nuclear weapons within Allied territory in Europe, as these arrangements do not involve any transfer of nuclear warheads or control over them in peacetime.[92] Finally, consultations (including joint planning) by nuclear and non-nuclear-weapon states within both NATO and the Warsaw Pact are not foreclosed.[93]

(iv) Not to "assist . . . to manufacture"—"not to manufacture": a long ladder with many rungs

The language employed in these clauses of Articles I and II is as broad and general as it is vague. Nuclear-weapon Powers must not "*assist, encourage* or *induce*" non-nuclear-weapon states *to manufacture* weapons, and correspondingly the latter states are not to seek or receive any *assistance in the manufacture*. Moreover, the non-nuclear-weapon states are prohibited from such manufacture even with indigenous resources and without outside assistance.

Part I of Protocol III (On the Control of Armaments) of Oct. 23, 1954, modifying and completing the Treaty of Brussels of March 17, 1948, 211 U.N.T.S. 364. Neither the United States nor the Soviet Union is a party to this treaty. The post-World-War II Peace Treaties with Austria, Bulgaria, Hungary, Finland, Italy and Rumania contain clauses prohibiting these states to possess, test or manufacture nuclear weapons.

[91] Bunn, "The Nuclear Nonproliferation Treaty," note 84 above, at 769–771.

[92] Secretary of State Rusk in Hearings on Exec. H (Treaty on the Non-Proliferation of Nuclear Weapons), before the Committee on Foreign Relations, U. S. Senate, 90th Cong., 2nd Sess., July 10–12 and 17, 1968, at 5–6; Hearings on the Military Implications of the Treaty on the Non-Proliferation of Nuclear Weapons, before the Committee on Armed Services, U. S. Senate, 91st Cong., 1st Sess., Feb. 27 and 28, 1969, at 11–12. The treaty does prohibit the transfer of even defensive antiballistic missiles to NATO or any other "transferee" but it would not preclude a transfer of delivery vehicles such as Polaris submarines and missiles (less warheads).

[93] U. S. statement in ENDC, ENDC/PV.253 at 10–16 (March 31, 1966).

Legislative history offers little, if any, guidance as to what constitutes "manufacture," [94] a concept which was described by a Swedish representative as "a long ladder with many rungs." "Manufacture" of nuclear weapons would presumably not include "preliminary thinking of politicians and the laboratory research of scientists" [95] but it would clearly cover "the construction of an experimental or prototype nuclear explosive device, or of components that could only have relevance to such a device." It would not include "the production of fissionable material or the construction of a reactor in a peaceful program under the safeguards required by other articles of the treaty." [96]

We face a similar quandary in seeking to divine what is and what is not included in "assist" or "assistance" to manufacture, since "[a]lmost any kind of international nuclear assistance is potentially useful to a nuclear weapons program." [97] But the obligation to attach safeguards to a specified type of peaceful assistance as required by Article III [98] provides some indication of what was meant by these terms.

The injunction not "to encourage or induce" to manufacture has its origin in the Test Ban Treaty [99] and the terminology is at least equally vague. The problems analogous to those discussed in this connection under the corresponding Test Ban Treaty language [100] could arise under the Non-Proliferation Treaty as well.[101]

(v) "Sovereign inequality"

The basic obligations discussed above disclose a difference in the treatment of nuclear-weapon Powers and other states in three principal respects:

(1) The non-nuclear Powers are barred from nuclear weapons while the nuclear Powers may retain them.[102] India (which is concerned about the Chinese nuclear weapon program), the Federal Republic of Germany (which has been the target of hundreds of nuclear-tipped Soviet missiles) and other states expressed concern over what would happen in the event of a nuclear threat or attack upon them, if they renounced nuclear weapons altogether. Responding to this concern, the Soviet Union, the United

[94] Willrich, note 40 above, at 90–93.

[95] Statement by Sweden in ENDC, ENDC/PV.243 at 11–12 (Feb. 24, 1966).

[96] Bunn in Boskey and Willrich, note 68 above, at 31, summarizing statement by William C. Foster, Director, U. S. Arms Control and Disarmament Agency.

[97] Willrich, note 40 above, at 93–94. [98] Art. III (2).

[99] Art. I (2) of the Test Ban Treaty prohibits "causing, encouraging, or in any way participating in . . . ." [100] See above, at p. 271.

[101] As far as the problems between the U. S. and France are concerned, however, it should be kept in mind that the prohibition "to assist, encourage, or induce" to manufacture applies only to manufacture by non-nuclear-weapon states.

For a series of questions of interpretation, including a "loophole" in Art. II, see Willrich, note 40 above, at 94–98.

[102] Moreover, while nuclear-weapon states are barred from transferring nuclear weapons to anyone, they are not barred from assisting *each other* in the manufacture of such weapons. They may also receive such assistance (*e.g.*, in the form of source material) from a non-nuclear-weapon state. A non-nuclear-weapon state party to the treaty may not receive such assistance. However, if the treaty is given literal interpretation, there would be no violation if a non-nuclear-weapon state party to the treaty should give such assistance to a non-nuclear-weapon state not a party.

Kingdom and the United States made parallel declarations of intention concerning action which would be taken in such an event by the United Nations Security Council. At their initiative, the Security Council adopted a resolution in which it recognized its responsibility to act immediately in case of a nuclear crisis and welcomed the intention of the nuclear states to give immediate assistance to a threatened non-nuclear-weapon state, party to the Non-Proliferation Treaty.[103] Again, in Article VI of the same treaty, the nuclear Powers undertook an added obligation to negotiate "in good faith" on effective measures toward ending the arms race and achieving disarmament and thus presumably reducing the possibility of nuclear blackmail. Finally, a fixed time limit for a review of the treaty in the light of progress in this and other areas was provided in Article VIII.

(2) The nuclear-weapon Powers retain the right—limited as it may be by the Test Ban Treaty—to develop Plowshare-type programs of peaceful explosions; the non-nuclear-weapon states are barred from developing such technology. In order to mitigate this denial somewhat, the nuclear Powers agree[104] to make the "potential benefits" of this technology available at as low a charge as possible, excluding any charge for research and development. Nevertheless, Brazil is not prepared to accept this arrangement and some other states may take the same position.

(3) Non-nuclear-weapon states accept international safeguards on their entire peaceful uses programs (including nuclear research and power reactors) designed to assure that materials are not diverted from peaceful to military uses; the nuclear-weapon states remain free of any such obligation. The Federal Republic of Germany, Italy and others expressed concern lest their industries be placed at a competitive disadvantage and become open to industrial espionage through potential abuse of the international control mechanism.[105] The recent agreement on the content of the safeguards system should alleviate these fears to some extent.[106] Moreover, the United States has offered to accept the same safeguards system on its

[103] Security Council Res. 255 (XXIII), U. N. Doc. S/INF/23/Rev. 1 (1968). Bunn, "The Nuclear Nonproliferation Treaty," note 84 above, at 776–778; T. B. Larson, Disarmament and Soviet Policy 1964–1968 at 153–154 (Englewood Cliffs, N. J.: Prentice-Hall, 1969); Fisher, "Global Dimensions" in Boskey and Willrich, note 68 above, at 6; Lenefsky, "The United Nations Security Council Resolution on Security Assurances for Non-nuclear Weapon States," 3 N.Y.U. J. of Int. Law 56 (1970).

[104] Art. V.

[105] For a controversial, strongly critical German view of the treaty, see M. Hepp, Der Atomsperrvertrag—Die Supermächte verteilen die Welt (Stuttgart-Degeresch: Seewalt Verlag, 1968). But see O. Kimminich, Völkerrecht im Atomzeitalter—Der Atomsperrvertrag und seine Folgen (Freiburg im Breisgau: Verlag Rombach, 1969). For an unofficial Italian view, see Albonetti in M. Willrich, Civil Nuclear Power and International Security at 85, 89–90 (New York-Washington-London: Praeger Publishers, 1971).

[106] This agreement was reached within the International Atomic Energy Agency. It is embodied in the document "The Structure and Content of Agreements between the Agency and States Required in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons," INFCIRC/153 (IAEA, May, 1971). By the end of 1971, seven states (Austria, Bulgaria, Canada, Finland, Hungary, Poland and Uruguay) completed the negotiations for a bilateral safeguards agreement with IAEA under this document. U. N. Press Release WS/530, Nov. 25, 1971, at 12 and oral report.

nuclear activities (excluding those with direct military significance) and it has taken concrete steps in this direction.[107] The United Kingdom has made a similar offer, but the Soviet Union has not.

The discriminatory features of the treaty become less disturbing if one accepts the proposition that there are good reasons why a state should refrain from a nuclear weapon program. Apart from economic considerations of cost, nuclear weapons in the hands of one state are likely to be viewed as a threat to its neighbors—in many cases a potential nuclear state. Israel and the Arab states, and Pakistan and India are telling examples. The risk to the international community at large from irresponsible and accidental use is increased with proliferation, although this view is contested by some.[108]

The treaty was approved in the United Nations General Assembly by an overwhelming vote of 95 to 4 (Albania, Cuba, Tanzania and Zambia) but there were 21 abstentions, including France and India. It was signed by 97 states and ratified by 70 as of October, 1971. France has made it clear that, while not adhering, it will conduct itself in accordance with the treaty. The People's Republic of China, however, rejected the treaty as "another grave step toward an open nuclear-military alliance . . . to oppose China." [109]

The treaty as it is written, with its unequal restrictions and controls, is not likely to endure unless the super-Powers make substantial progress toward ending "vertical proliferation" of their own nuclear arsenals through the SALT negotiations or otherwise.

The above-mentioned declarations of intention made by the nuclear-weapon Powers in effect do not increase their legal obligations under the U.N. Charter vis-à-vis the non-nuclear states. Thus, as a matter of international law, these declarations do not add to the security of the non-nuclear states. From a political viewpoint, of course, the declarations have certain meaning, particularly if they presage a broadening consensus of the super-Powers in the security field and a possible revival of the assumptions underlying the original concept of the United Nations security system.[110] The seating of the People's Republic of China

[107] President Johnson's Remarks by Closed-Circuit Television During Ceremonies Marking the 25th Anniversary of the First Nuclear Reactor, Dec. 2, 1967, 3 Weekly Compilation of Presidential Documents 1650 (Washington, D. C.: U. S. Govt. Printing Office, Dec. 11, 1967). The list of U. S. facilities to be covered is under discussion with the International Atomic Energy Agency in Vienna.

[108] R. Aron, The Great Debate—Theories of Nuclear Strategy 237–241 (Garden City, N. Y.: Doubleday & Co., 1965).

[109] New China News Agency, statement of March 13, 1968, cited in Bunn, "The Nuclear Nonproliferation Treaty," note 84 above, at 778. See, generally, M. H. Halperin, China and Nuclear Proliferation (The University of Chicago, Center for Policy Studies, 1966). Of the "nuclear threshold states," India and Israel did not sign, Japan and the Federal Republic of Germany have signed, Canada and Sweden have signed and ratified.

[110] Fisher in Boskey and Willrich, note 68 above, at 5–6. But see Kaplan, "Weaknesses of the Nonproliferation Treaty," XII Orbis 1042 at 1045 (1969); see also Foscaneanu, "International Security and Cooperation," (France) in Int. Law Association, Report of the 53rd Conference, Buenos Aires at 468 (London: Int. Law Ass'n., 1969).

in the Security Council makes it even more difficult to speculate about the future. The Non-Proliferation Treaty will fail if it is used to buttress the bipolar aspects characteristic of the postwar world, in disregard of emerging new centers of influence. Nuclear weapons involve not only security: unless and until they are effectively "delegitimized," they will continue to represent also prestige, status and influence in the international arena, making it difficult for the major industrial states, at any rate, to renounce them permanently. While complete equality in law (as in fact) is not and has never been feasible, legitimate security, economic and political interests of other states must be taken into account if the treaty is to achieve its purpose.

(c) Draft "Convention" [111] on bacteriological (biological) weapons (CBW)

(i) Why new Convention after Geneva Protocol? Beyond prohibition of use

The United Kingdom took the initiative in first proposing a concrete, new arms control measure in this field. Before that, the United Kingdom explained the inadequacy of the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare,[112] and the corresponding need for further restraints.[113]

(1) Perhaps the most obvious shortcoming of the Protocol lies in the reservations by which many parties have qualified their adherence, thus diluting the legal effect of the prohibition. On their face, the reservations permit the reserving parties to use chemical and biological (CB) weapons

[111] It has not been explained why all parties involved use the term "convention" rather than "treaty" in this field.

I discuss the distinguishing characteristics of the chemical and bacteriological weapons in my study cited in the initial footnote to this article. Bacteriological (biological) agents of warfare are living organisms (bacteria, viruses, fungi, etc.) and infective material derived from them which are intended to cause disease or death in man, animal, or plants, and whose effectiveness depends on their ability to multiply in the organism attacked. Chemical and Bacteriological (Biological) Weapons and the Effects of Their Possible Use, Report of the Secretary General at 5 (New York: United Nations, 1969). The Report points out that, in the context of warfare, all the above agents are generally recognized as "bacteriological weapons," but in order to eliminate any possible ambiguity, the Report uses the phrase "bacteriological (biological) weapons" to comprehend all forms of biological warfare, *ibid.* I shall use generally the term "biological."

[112] 94 L.N.T.S. 65 (1929). The Protocol prohibits "the use in war of asphyxiating, poisonous, or other gases, and of all analogous liquids, materials or devices" and "the use of bacteriological methods of warfare." It is now binding upon 96 nations, including all the major military and industrial Powers with the sole exception of the United States. 54 Dept. of State Bulletin 455 at 456 (1971). President Nixon resubmitted the Protocol to the U.S. Senate for its advice and consent. Message from the President of the United States Transmitting the Protocol, etc., 91st Cong., 2d Sess., Sen. Exec. J, Aug. 19, 1970 (Washington, D.C.: U.S. Govt. Printing Office, 1970). See, generally, Baxter and Buergenthal, "Legal Aspects of the Geneva Protocol of 1925," 64 A.J.I.L. 853 (1970), and in The Control of Chemical and Biological Weapons, Carnegie Endowment for Int. Peace at 1 (New York, 1971); Bunn, "Banning Poison Gas and Germ Warfare: Should the United States Agree?" 1969 Wis. Law Rev. 375.

[113] Working Paper on Microbiological Warfare, ENDC/231 (Aug. 6, 1968).

against other parties which have violated their obligations under the Protocol and against any state not a party to the Protocol, even if it had not initiated CB warfare.[114]

(2) Jurists are not agreed as to whether or to what extent the Protocol represents customary international law. *First,* this uncertainty reflects upon the continued validity of the reservations. *Second,* it also indicates that the legal status for those states that have not adhered to the Protocol is unclear. *Third,* although the majority of the General Assembly expressed the view that the prohibition under "general international law as embodied in the Protocol" is comprehensive and includes not only lethal chemical gases but also irritants such as tear gases and anti-plant agents such as defoliants, a major opposition exists to such an interpretation; [115] similarly, in the British view at any rate, the Protocol would not subsume the newer range of microbiological agents developed after 1925, thus raising the familiar problem of interpreting fixed legal language in the light of evolving science and technology.

(3) The Protocol prohibits the use of CB agents "in war." There may be some doubt as to its applicability in case of hostilities not technically amounting to "war."

(4) The most important shortcoming of the Protocol, however, is that it prohibits only the *use* of the agents in question, not possession or production. Possession might lead to use in contravention of the undertaking in the Protocol.

In view of these inadequacies, the United Kingdom offered as a first step a draft convention limited to biological agents, because the problem of reaching agreement "might be made less intractable by considering chemical and microbiological methods of warfare separately." [116]

(ii) Separate or joint treatment for B and C agents? A surprise from Moscow

The British initiative was a signal for an extensive debate in Geneva and New York on the scope of the proposed convention. This debate was reminiscent of the arguments regarding the scope of the nuclear weapon test ban and the reach of the Seabed Treaty. Arguments in support of a separate treatment of the B and C agents were based on the alleged differences between them in terms of their respective effects, military rôles

[114] 39 states (including France, the Soviet Union and the United Kingdom) have ratified or acceded with reservations. Most of the reserving states assert that the protocol is binding on them only with respect to other parties, and nineteen reserving states limit the prohibitions to "no first use," leaving unaffected the right of retaliatory use of the weapons covered. Baxter and Buergenthal, note 112 above, at 869–873.

[115] General Assembly Res. 2603A (XXIV) of Dec. 16, 1969, Supp. 30 at 16, U.N. Doc. A/7630 (1969). The division on this resolution was 80 votes in favor, with Australia, Portugal and the United States voting against and 36 Members abstaining.

[116] ENDC/231 at 2 (Aug. 6, 1968). Draft Convention and Accompanying draft Security Council Resolution, ENDC/255 (July 10, 1969), subsequently revised as ENDC/255/Rev. 1 (Aug. 26, 1969) and Rev. 2 (Aug. 18, 1970). A. V. W. Thomas and A. J. Thomas, Jr., Legal Limits on the Use of Chemical and Biological Weapons at 113–117 (Dallas: Southern Methodist University Press, 1970).

and existing capabilities. Those who favored separate prior treatment for biological agents stressed the urgency of prohibiting production before a possible scientific breakthrough, and above all, the less difficult problem of verification that a ban on these agents poses as against a ban on chemical agents.[117]

The Socialist states strongly opposed the limited approach. As an alternative to the British draft, they offered a comprehensive proposal that would cover both C and B agents, initially without any verification provision whatsoever.[118] A number, if not the majority, of the participants subscribed to the need for a joint treatment, but they recognized that the requirements of verification would have to be met in some measure. The United States and most of the NATO states gave full support to the British text. The General Assembly adopted an ambiguous formula which recommended that C and B weapons ". . . should continue to be dealt with together in taking steps towards the prohibition of their development, production and stockpiling and their effective elimination from the arsenals of all States. . . ." [119]

While Sweden and others were exploring a possible compromise, the Soviet Union accepted the British approach, to everybody's surprise and to the considerable annoyance of the non-aligned members in the Disarmament Committee.[120] Thus, the by now familiar pattern of great-Power consensus "in principle" on a more limited measure repeated itself. A joint Socialist-Western draft, amended to reflect numerous ideas expressed in the Disarmament Committee was approved by that Committee and it was endorsed by the General Assembly in December, 1971.[121]

[117] The arguments made in CCD are summarized in SIPRI, note 48 above, at 194–195. For the actual debates, see generally CCD/PV. 449, 457, 458, 461, 462, 466, 468, 481, 491 (all 1970). I deal with the problem of verification in the study cited in the initial footnote to this article.

[118] U.N. Docs. A/7655 (1969), A/8136 (1970). For a Soviet view, see Petrov, "An Important Aspect of Disarmament (on Banning Chemical and Biological Weapons)," 1970 International Affairs (Moscow) 53–56 (No. 2/3, March, 1970).

[119] General Assembly Res. 2662 (XXV), U.N. GAOR, Supp. 28 at 14–15, U.N. Doc. A/8028 (1970); see also General Assembly Res. 2603B III (XXIV), U.N. GAOR, Supp. 30 at 17, U.N. Doc. A/7630 (1969).

[120] Hamilton, "Mexico Urges the Nonaligned at Geneva to Press Arms Plans Shelved by Big 2," New York Times, May 5, 1971 at C3, col. 4–6. The Socialist draft of a convention limited to biological weapons was contained in CCD/325 (March 30, 1971).

[121] See "parallel" drafts CCD/337 and CCD/338 of Aug. 5, 1971, and the final joint text sponsored by the eight Socialist states and Canada, Italy, Netherlands, United Kingdom and United States in CCD/353 of Sept. 28, 1971, entitled "Draft convention on the prohibition of development, production and stockpiling of bacteriological (biological) and toxin weapons and their destruction," reprinted below, p. 451. The final endorsement by the General Assembly is in A/RES.2826 (XXVI), Dec. 16, 1971; no negative votes were cast, but France abstained. There is no provision in the convention for verification of compliance by observation or access to the installations concerned or by any other safeguards machinery. According to Art. VI, a party may bring an alleged violation before the U.N. Security Council and each party undertakes "to co-operate in carrying out any investigation which the Security Council may initiate. . . ." France expressed concern that this procedure (which may be considered as adequate for weapons

(iii) Basic obligations

Each party to the new convention undertakes *first* "never in any circumstances to develop, produce, stockpile, or otherwise acquire or retain" (a) B agents or toxins "of the types and quantities that have no justification for prophylactic, protective or other peaceful purposes";[122] and (b) "weapons, equipment and means of delivery designed to use such agents for hostile purposes or in armed conflict."[123]

Second, each party promises to destroy, or to divert to "peaceful purposes" all the prohibited materials not later than nine months after the entry into force of the convention.[124]

Third, a "non-proliferation" provision, reminiscent of the Non-Proliferation Treaty, bars any transfer or assistance to "any State, group of States or international organizations" in the manufacture or acquisition of the prohibited material.[125]

The emphatic phrase "never in any circumstances" was added in the first undertaking for two specific purposes which are not apparent without recourse to "preparatory works": It was to remove "any residual doubt" that the convention, like the Geneva Protocol, would remain operative in time of war. More importantly, the phrase was to deal with the thorny problem of the reservations to the Geneva Protocol by which many parties have retained the right to use the weapons covered by the Protocol under specified circumstances. Even though such reservations "may legally remain in force,"[126] the above phrase "will serve to emphasize the intention of parties to this convention that reservations to the Protocol should not,

---

of little or no military use) will be pressed as a precedent for future treaties dealing with more effective weapons.

[122] Art. I (1). The full definition reads: "Microbial or other biological agents, or toxins whatever their origin or method of production." This definition, minus the final clause on toxins, appeared in the principal prohibition clause of the original British draft and it was adopted by the Socialist draft. Toxins are biologically produced chemical substances which differ from biological agents in that they do not reproduce within the host organism. It is, however, conceivable that toxins could be produced by chemical synthesis. The clause elaborating on toxins was added in the final joint text at the suggestion of Sweden to ensure that the prohibition extended to toxins produced by chemical synthesis as well as those produced by bacteriological or any other biological methods. See Mr. Leonard (U.S.), CCD/PV.542 at 16 (Sept. 28, 1971). Toxins were added to the prohibition originally at the suggestion of the United States.

There appears to be no disagreement that all B agents or toxins "causing death, damage or disease to man, other animals or crops" (U.K. draft Art. I, CCD/225/Rev. 2, Aug. 18, 1970) are included. The coverage reflects the substance of the definition in Chemical and Bacteriological (Biological) Weapons and the Effects of Their Possible Use, Report of the Secretary General, par. 17, at 5 (New York: United Nations, 1969).

Given the possibility of new scientific developments, a question could still conceivably arise whether an agent was chemical rather than biological, and thus not covered by the convention. See *ibid.*, par. 19, at 6.

[123] Art. I (2). The concept "hostile purposes" has not appeared in any previous arms control agreement. It may suggest action by a civilian saboteur not necessarily connected with an armed conflict.

[124] Art. II.

[125] Art. III.

[126] Mr. Hainsworth (U.K.), CCD/PV.542 at 42.

as a practical matter, result in any exception to the total prohibition. . . ." [127] Thus this phrase, and a preambular paragraph expressing the determination "to exclude completely the possibility" of the use of the prohibited weapons, are to serve as a substitute for an express prohibition of the use of B weapons under any and all circumstances. The Soviet Union opposed the inclusion of such "repetition" of the prohibition in the convention.[128]

The flat ban on production and acquisition in the first undertaking parallels that encountered in the Non-Proliferation Treaty; it extends, however, not only to the agents but to all delivery systems as well. Only the production, in appropriately limited quantities, of those types of agents that are designed for disease prevention ("prophylactic purposes") and protection ("protective or other peaceful purposes") is exempted from the prohibition.[129] The exemption is designed primarily to meet the ever-present problem of technological ambiguity, since some agents are required for immunization, medical therapy and related research. In the final text the exemption was clarified so as to encompass also "protective purposes" which were to include the development of protective equipment [130] and laboratory quantities of certain agents or toxins required for research and testing of substances that would be employed as a protection against a biological attack.[131] The record makes it quite clear, however, that the exemption cannot be interpreted as preserving the freedom of stockpiling agents or toxins for weapons purposes "on the theory that such weapons were for 'defensive' warfare, retaliation or deterrence." [132]

(v) What value of the BW Convention?

We have noted earlier that CB weapons are included as weapons of mass destruction in the restraints of the Outer Space Treaty and the Seabed Treaty. But the uses of these weapons in outer space and on the seabed

[127] Mr. Leonard (U.S.), *ibid.* at 16; Mr. Roshchin (U.S.S.R.), *ibid.* at 32.

[128] Soviet representatives consistently maintained that the prohibition of the use of chemical and bacteriological weapons is "a universally recognized rule of international law." The argument was that the inclusion of such prohibition in a convention dealing with *production* was unnecessary and, because the convention was limited to B agents, even risky. See, generally, SIPRI, note 48 above, at 200–201.

[129] The U.K. maintained that it was not practicable to specify what types and quantities are consistent with peaceful purposes, for the possible circumstances were too varied; however, the types and quantities of agents would be important criteria in deciding the question of peaceful-hostile purpose. The U.N. Security Council would have to decide whether the types and quantities indicated in an investigation could be justified as necessary for peaceful research or use. ENDC/PV.418 at 10 (July 10, 1969).

[130] *E.g.*, protective masks and clothing, air and water filtration systems, detection and warning devices, and decontamination equipment. Mr. Leonard (U.S.), CCD/PV.542 at 16 (Sept. 28, 1971).

[131] *Ibid.* at 17. See also U. K. statement in ENDC/PV.418 at 10 (July 10, 1969). On the nature of defensive measures, see Màlek, "Biological Weapons," in S. Rose (ed.), CBW Chemical and Biological Warfare at 19–26, 81–82 (Boston: Beacon Press, 1969).

[132] U. S. Representative in CCD/PV.542 at 17 (Sept. 28, 1971). The U. S. Representative also stated that the exemption would not permit retention for "non-peaceful" purposes of quantities that, when acquired, had a justification for a peaceful purpose. See, to the same general effect, Mr. Roshchin (U.S.S.R.), *ibid.* at 33–35. For an earlier discussion see CCD/PV.479 at 9 (July 16, 1970).

assume a level of technology that today is available mainly, if not exclusively, to the super-Powers. No such "*de facto*" limitation applies to the ban in the new convention since the production of biological weapons is within the technological and economic capabilities of many states. For this, if for no other reason, the broadest possible adherence appears necessary.

This convention will be the second arms control agreement, after the Test Ban Treaty, that will require states to abandon a specified weapon activity in which they had been actually engaged. To the extent that weapon stockpiles will be destroyed in compliance with the convention, it will represent the first limited disarmament or "reduction-of-armament" measure. It will also be the first undertaking without a possibility of verification in the sense in which that term has been generally understood.[133]

Commenting on the significance of this effort, Mr. Castañeda of Mexico was of opinion that biological weapons are "practically unusable weapons because they represent as great a danger for the user as for the adversary"; the effect of the convention would be achieved, he thought, if the Soviet Union "made a similar declaration" to that made by the United States "to renounce all biological weapons and lethal toxins of an offensive character" and to pledge "the elimination of existing stocks of those weapons." [134]

In order to placate the general concern that a ban on biological weapons will remove the incentives for a ban on chemical weapons (as the partial nuclear test ban has relieved public pressures for a complete ban) the convention includes a specific undertaking to continue negotiations "in good faith" with a view to an "early agreement" on the elimination of chemical weapons.[135]

The convention will add a new and a more stringent legal restraint to the existing legal, ethical and political restraints on the use and stockpiling of biological weapons. These weapons, however, clearly are not at the

[133] See my study cited in initial footnote above.

[134] CCD/PV.513 at 18–19 (May 4, 1971). President Nixon stated that, since biological weapons have "massive, unpredictable, and potentially uncontrollable consequences," the United States will renounce any use of biological and toxin weapons, confine its program to research "for defensive purposes, strictly defined" (such as immunization and safety measures), dispose of existing stocks of bacteriological weapons, and seek further agreement on effective arms control measures in the CBW field. He requested the Senate to give its consent to ratification of the Geneva Protocol. See above, note 112. White House Press Releases, Nov. 25, 1969, and Aug. 19, 1970. See also White House Press Release (Key Biscayne, Fla.) dated Feb. 14, 1970, including toxins in the renunciation.

The Soviet Union has not admitted the possession of BW weapons. Alexander, in The Control of Chemical and Biological Weapons, note 112 above, at 100. In discussing the provision of the new convention requiring destruction or diversion to peaceful purposes of the prohibited substances, the Soviet Union's Representative declared that the "Soviet side" is prepared to give "appropriate notification of the compliance with this provision on the understanding that other parties to the Convention do likewise." CCD/PV.542 at 36 (Sept. 28, 1971).

[135] Art. IX of the new convention. See also Art. XII on a conference to be held in five years to review the "operation" of the convention, including the progress in the negotiations on chemical weapons. *Cf.* the Socialist draft, Art. IX, CCD/325 at 4 (March 30, 1971).

center of the disarmament problem. As an editorial opinion pointed out in this context, "the disarmament conference must be extremely wary of letting itself be side-tracked into exercises that evade the more pressing issues and produce an illusion of genuine progress toward arms control." [136]

Summary and Some Concluding Observations

The assumption underlying this discussion has been that a limitation on the arms race and a safeguarded reduction of armaments were essential for a more secure world order and a more rational allocation of world resources. Can we then conclude that the legal restraints imposed by the arms control agreements have contributed to these twin objectives, and if so, to what extent?

The sum total of the legal restraints in the arms control measures may be summarized as follows:

(a) No essentially military activities shall take place on the Antarctic continent or on the moon and other celestial bodies.

(b) No weapons of mass destruction, that is, nuclear and chemical-biological weapons, shall be deployed in outer space or emplaced on the deep seabed; nor shall any facilities designed for nuclear weapons be placed on the deep seabed.

(c) All nuclear explosions are prohibited except that the nuclear-weapon states may continue both peaceful explosions and weapon testing underground, providing the resulting radioactive debris does not cross national frontiers.

(d) There shall be only five nuclear-weapon states. All other states which accept the restraints will renounce both nuclear weapon and peaceful nuclear explosion programs; they will be assisted in the development of their peaceful uses programs by the nuclear-weapon states, but they will accept international safeguards upon all these programs in order to ensure that no nuclear materials are diverted to weapon purposes. No nuclear weapons shall be located in the Latin American zone; a regional safeguards system will provide additional assurance that there shall be no nuclear weapon or (presumably) explosion programs in that zone.

(e) According to a broadening consensus, the use of both chemical and biological methods of warfare is prohibited by international law, but disagreement persists on the legality of the use of chemical irritants and anti-plant chemicals. Production for other than prophylactic or protective purposes of biological agents, toxins and related delivery means shall be prohibited and existing stockpiles destroyed.

(f) The two nuclear super-Powers undertake to assure effective mutual communication and other arrangements with a view to avoiding accidental or unauthorized use of nuclear weapons.[137]

(g) All states shall pursue negotiations "in good faith" on further measures to end the arms race, including nuclear disarmament and on a treaty

[136] "Banning Germ Warfare," New York Times, April 3, 1971, at C 28.

[137] On the bilateral agreements, see note 14 above.

for general and complete disarmament under strict and effective international control.

Only two of the above legal restraints, those in the Test Ban Treaty and in the Biological Weapons Convention, compel states to terminate activities in which they have actually engaged, and only the latter would require actual "reduction" of armaments. All the other restraints are in the nature of "preventive disarmament." This means that they are designed to prevent the extension of the arms race to environments and areas where it had never existed. Thus there were no vested military-bureaucratic-industrial interests in on-going activities or systems that had to be overcome. Timely agreement on these restraints was important, because mass allocation of resources and new technology might have made the prohibited military uses in the new environments, particularly in outer space, both feasible and attractive. The present restraints are incomplete, however, since significant military uses of outer space and the deep seabed remain legitimate. Although massive expenditures were avoided because of the agreed restraints, both super-Powers continue to allocate large amounts to research on weapon systems for outer space and the sea.

The "partial" nature of the arms control agreements has posed several problems: First, underground weapon testing was substituted for testing in the prohibited environments at increased cost but with relatively little sacrifice in weapon development. For most practical purposes, the partial test ban has become an environmental protection agreement rather than an arms control measure. Again, it was argued that, if prohibition of production is limited to biological warfare agents, the production of chemical agents will be increased as a substitute; unlike biological weapons, chemical weapons were employed in the past and are militarily useful. Second, in the short-run perspective, agreements on partial measures have relieved the pressures and incentives for other, more far-reaching measures such as the comprehensive test ban and perhaps also the ban on production of chemical warfare agents. On the other hand, in the long run, the step-by-step approach could have a "spill-over" effect, somewhat analogous to the process of gradual economic integration by sectors in Europe. Third, since the West generally refuses to accept any restraint which cannot be monitored for compliance, and because the Soviet Union rejects "intrusive" verification, the range of the acceptable measures is reduced pending elaboration of acceptable verification procedures which must be tailored to fit a particular partial measure.

The arms control measures do not provide for elimination of nuclear weapons. They do not require renunciation of wartime use of such weapons, or even a limitation of such use to retaliation against nuclear attack. Despite a certain level of consensus (manifested in the General Assembly Declaration of 1961),[138] that the use of nuclear weapons is contrary to the international law of war, it cannot be said that a general rule outlawing any such use has become part of international law.

[138] General Assembly Res. 1653 (XVI), GAOR, Supp. 17 at 4–5, U. N. Doc. A/5100 (1961).

The sum total of the restraints accepted in the arms control agreements represents a moderate reform of the international system rather than a structural or qualitative change. The international system continues to be based on nation-states, most of which continue to rely for their security on national or allied military power. The arms control agreements are limited supplements, by no means alternatives to the reliance on military power.

The super-Powers still pursue the deterrence strategy, and nuclear weapons remain the crucial component of their strategic deterrent forces. Although the arms control agreements may have weakened the great military alliances politically, they have left undisturbed the existing arrangements for stationing nuclear weapons on allied territory. Moreover, the bipolar aspects of the international system have been increased and institutionalized, at least temporarily, for the benefit of the super-Powers, in the face of a contrary trend toward polycentrism, that is, the emergence of new centers of political, moral and economic, if not military influence.

Because of their basically undiminished reliance on national military power, states have been hesitant to accept arms control measures containing meaningful restrictions on their military activities, particularly in absence of ironclad safeguards against evasion. In order to be able to recapture their freedom of action and get rid of the restrictions, they have insisted on clauses for withdrawal at short-term notice, and they have resisted compulsory third-party dispute settlement procedures. These features and, more importantly, the refusal of China and of certain other "nuclear threshold" states to co-operate, have added to the instability of the measures.

On the other hand, the negotiations on the arms control measures have greatly increased the understanding of arms control problems, and the agreements reached in these negotiations have improved the climate in the international system, particularly between the super-Powers. As these two Powers approach parity in their nuclear deterrents, the perception of their common interest may be broadening. In the current phase, the negotiations have become focused on the really important issues of limitation on the number of nuclear defensive and offensive delivery systems. Moreover, the nature of the arms race has changed somewhat. In the past, decisions with respect to development of a new weapon system were made exclusively on the basis of its technological potential and the assumed general policy objectives of the other side. Today, as the interactive character of the arms race increases, national decision-makers are compelled, in calculating the value of any new system, to take into account also the other side's probable counteraction in the weapons field and the expenditure of funds required for the development or deployment of a new system. Neither side, however, has as yet given these considerations the full weight they deserve.

It should be noted that no arms control agreements have been negotiated thus far that would impose restraints upon acquisition or require reduction of conventional weapons. These weapons are of particular concern to

smaller states. To some extent at least, the absence of agreements on conventional weapons is indicative of the attitudes of smaller states: they have been generally ready to press for restraints with respect to weapons which they have had no expectation of acquiring but have shown no great eagerness to negotiate on limitations with respect to weapons in their own arsenals.

Arms control negotiations are a complex process which interacts with the bilateral and multilateral relationships among the nation-states generally. After more than a quarter of a century of negotiations, it has become increasingly evident that real progress in arms limitations cannot be achieved without reduction of tension and political settlements among the major Powers and without substantial strengthening of international institutions for the maintenance of peace. In the short-run perspective, since states are not prepared to accept general and complete disarmament, agreements on partial measures are likely to remain the standard instrumentalities for arms control consensus.

TECHNOLOGICAL CHALLENGE TO THE SHARED ENVIRONMENT: UNITED STATES PRACTICE

*By Frederic L. Kirgis, Jr.**

I. Introduction

In an era of expanding interest in international environmental problems,[1] it is essential to examine the rapidly developing state practice concerning man's startling capability, through the use of technology without any hostile intent, adversely to alter not just the immediate environment of his neighbor but common resources shared by all. The present discussion does not attempt to deal with the practice of all states, but rather considers the extent to which legally relevant expectations of restraint are being shaped by United States practice concerning the use of novel technology in the *res communis*.[2] The focus on United States practice reflects the belief that, within the confines of a law journal article, considerable light may be shed on world community expectations by an examination of the practice of a state which has a major interest in the field and which is a significant participant in the international law-creating process. If consistent principles can be found to underlie United States practice, a first step might be taken toward identifying areas of consensus essential both to the ultimate fashioning of viable institutions[3] and to the existence of some degree of environmental order before comprehensive agreements are reached.[4]

* University of Colorado School of Law.

[1] Materials relating to the United Nations Conference on the Human Environment vividly demonstrate the interest. See, *e.g.*, G.A. Res. 2581, 24 U.N. GAOR Supp. 30, at 44, U.N. Doc. A/7630 (1969); Reports of the Preparatory Committee for the U.N. Conference on the Human Environment, U.N. Docs. A/CONF.48/PC.6 (1970), A/CONF.48/PC. 9 and 13 (1971).

[2] "*Res communis*," as used here, is synonymous with "shared environment," and includes the atmosphere, outer space, oceans and deep seabeds. Space does not permit discussion of activities within national territories which indirectly affect the *res communis*, except to the extent that they are involved in the case law. See generally Hardy, "International Control of Marine Pollution," 11 Nat. Res. J. 296, 302–309 (1971). Concerning deep seabeds as *res communis*, see text at note 76 below.

[3] For discussion of the appropriate institutional machinery, see, *e.g.*, Hardy, *loc. cit.* note 2 above, at 344–348; Jenks, "The New Science and the Law of Nations," 17 Int. and Comp. Law Q. 327, 336–339 (1968); Kennan, "To Prevent a World Wasteland," 48 Foreign Affairs 401 (1970); Schachter, "Scientific Advances in International Law Making," 55 Calif. Law Rev. 423, 426–429 (1967).

[4] Emerging areas of consensus may also provide a basis for an intermediate lawmaking stage between non-regulation and formal agreement, such as the U.N. Declaration on the Human Environment. See 2d & 3rd Reports of the Preparatory Committee for the U.N. Conference on the Human Environment, U.N. Docs. A/CONF.48/PC. 9, at 16–17, and A/CONF.48/PC.13, at 38–41 (1971). See also Jenks, *loc. cit.* note 3 above, at 339;

The uncertainty of the occurrence and severity of ultimate harm, and the inability in many cases to identify a given state as uniquely affected by a threat to the common environment, present a significant challenge to an international legal system seeking to balance national freedom of non-belligerent action against the need to protect inclusive world interests. Imposition of pecuniary responsibility generally would not be adequate to deal with such problems.[5] Consequently the discussion will neglect the law's potential function as a re-allocator of costs through liability-creation, and will deal with the extent to which emerging norms of prior restraint are suggested by U.S. practice. The emphasis will be on major technology having high political visibility.[6]

II. Determinants of Expectations Concerning the Environment

A. *Expectations Stemming from International Case Law*

Inquiry must begin with the *Trail Smelter Case*,[7] a decision involving the United States which provides the leading internationally adjudicated precedent on environmental pollution. Fumes from the Trail Smelter, a privately owned plant in Canada, were damaging agricultural property in the State of Washington. One of the questions presented was ". . . whether the Trail Smelter should be required to refrain from causing damage in the State of Washington in the future and, if so, to what extent. . . ." [8] The tribunal concluded that

> . . . under the principles of international law, as well as of the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.[9]

Schachter, *loc. cit.* note 3 above, at 426. *Cf.* Declaration of Principles Governing the Sea Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction, G.A. Res. 2749, 25 U.N. GAOR Supp. 28, at 24, U.N. Doc. A/8028 (1970); 10 Int. Legal Materials 220 (1971).

[5] See Hardy, *loc. cit.* note 2 above, at 300, 312, note 44; Schachter and Serwer, "Marine Pollution Problems and Remedies," 65 A.J.I.L. 84 (1971); Report of the Secretary General to the Seabed Committee, Study on International Machinery, 25 U.N. GAOR Supp. 21, at 61, 113–114, U.N. Doc. A/8021 (1970).

[6] In order to facilitate perception of the law's growth process, the discussion will stress the law-creating and law-reflecting rôles of the mutual expectations of national and international decision-makers. See, *e.g.*, McDougal, "The Hydrogen Bomb Tests and the International Law of the Sea," 49 A.J.I.L. 356 (1955); M. McDougal, H. Lasswell and I. Vlasic, Law and Public Order in Space 115–120 (1963). For recent doctrinal expressions stressing the capacity of international law to change with events, see the dissenting opinions of Judges Koretsky and Tanaka in the North Sea Continental Shelf Cases, [1969] I.C.J. Rep. 155 and 172.

[7] United States *v.* Canada, preliminary decision, 3 Int. Arb. Awards 1911 (1938), 33 A.J.I.L. 182 (1939); final decision, 3 Int. Arb. Awards 1938, 35 A.J.I.L. 684 (1941).

[8] Convention with Canada for the Establishment of a Tribunal . . . , April 15, 1935, Art. III, 49 Stat. 3245 (1935–1936), T.S. No. 893; 30 A.J.I.L. Supp. 163 (1936).

[9] 3 Int. Arb. Awards at 1965, 35 A.J.I.L. at 716 (1941).

The *Trail Smelter Case* involved use of territory in a way that caused pollution damage in adjoining territory. The situation with which we are concerned, however, is limited neither to events occurring within the respondent state's territory nor to damage uniquely suffered within the territory of another state. These distinctions deserve brief mention, leaving aside for a moment the problems of imposing prior restraint and of establishing likelihood and extent of damage.

If the state is the actor in a public capacity, there is clearly no ground for avoidance of responsibility simply because the activities occur beyond national boundaries. As the state's participation becomes less direct, ranging from state-supported commercial activities to various forms of acquiescence in private ventures, the issue becomes increasingly difficult. It appears, however, that the policy embodied in *Trail Smelter* applies to any case in which the state has an active participation or in which its nationals are not subject to the jurisdiction of any other interested state to prescribe and enforce injunctive rules. Even if the United States had jurisdiction to prescribe on the ground that the pollution was felt in its territory,[10] it could not readily have enforced any rules prescribed. Canada was in a position to control the activities in question. The situation would not be fundamentally different if the pollution had emanated from a private Canadian-registered ship, aircraft or ocean floor station. The result does not depend on fictional extensions of Canadian territory, but on the need to repose responsibility in the state most capable of assuming it.[11]

On the second point, it might be asked whether individual states have a sufficient interest in prospective harm to the *res communis* to be effective participants in the law-creating process of assertion and counter-assertion.[12] There may be cases, of course, in which the maximum possible damage is so slight that no state will have a sufficient interest to merit protection. But whenever there is a signficant threat of harm to the *res*

[10] See Restatement 2d, Foreign Relations Law of the United States §18 (1965).

[11] *Cf.* Beesley, "Rights and Responsibilities of Arctic Coastal States: The Canadian View," 3 J. Maritime Law and Commerce 1, 10 (1971). In all cases there would be some state capable of applying and enforcing injunctive rules. *Cf.* Convention on the High Seas, April 29, 1958, Art. 5, (1962) 2 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82, 52 A.J.I.L. 842 (1958); and see Convention on the Continental Shelf, April 29, 1958, Arts. 2, 5, (1964) 1 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311, 52 A.J.I.L. 858 (1958); Outer Continental Shelf Lands Act, 43 U.S.C. §§1331–43 (1970), 48 A.J.I.L. Supp. 110 (1954); Declaration of Principles Governing the Sea-Bed and Ocean Floor . . . , par. 14, *loc. cit.* note 4 above; Draft Convention on International Liability for Damage Caused by Space Objects, Arts. II and III, 10 Int. Legal Materials 965 (1971). Analysis of jurisdictional difficulties lies beyond the scope of the present discussion, which is intended simply to show that the principle embodied in the Trail Smelter decision should not be limited to occurrences within the respondent state's territory.

[12] It has been questioned whether states have sufficient rights in fish in the high seas to be entitled to damages if the fish are injured. See McDougal and Schlei, "The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security," 64 Yale Law J. 648, 694, note 239 (1955). *Cf.* Hardy, *loc. cit.* note 2 above, at 299–300; Legault, "The Freedom of the Seas: A License to Pollute?", 21 Toronto Law J. 211, 217–218 (1971).

communis, an international legal order lacking institutions capable of effective public representation cannot require a showing of unique interest on the part of objecting states as a prerequisite to standing. This is particularly so when the claim is preventive rather than pecuniary, since the problem of allocating compensation among claimants does not arise.

It has been asserted that the *Trail Smelter* tribunal did not "unequivocally" face the issue whether a state may carry on conduct for which it is liable in damages, since the decision referred to the desire expressed by the parties in the *compromis* to reach a final solution.[13] Canada did not actively contest its responsibility for the conduct of the smelter. The Canadian Government was determined, however, to protect the smelter as a continuing enterprise.[14] It was willing to accept a result which was equitable to interests in the United States, and this seems to explain the provision in the *compromis* referring to the parties' desire to reach a "just" (not "final") solution.[15] There is no indication that the tribunal understood this to signify anything other than the expression of a desire to arbitrate in good faith and to arrive at a fair result. The tribunal did not rely on the provision in its enunciation of Canada's duty, and in fact said that the duty arose "[a]part from the undertakings in the Convention. . . ."[16] The decision consequently is relevant to the development of expectations concerning a duty to refrain from environmentally injurious conduct.[17]

If the decision is viewed as the ratification of a position already taken by the parties, Canada's acquiescence in the U.S. claim has independent legal significance. The United States had asserted a right to be relieved of air pollution originating in Canadian territory. Thus if Canada's response was tantamount to an acquiescence, the law-creating process of U.S. claim and Canadian response would create roughly the same expectations as to norms of future conduct as does the tribunal's decision if considered separately. It is more convincing, however, to treat the case as a precedent established by a decision-making body external to the disputants.

This leaves for consideration the extent of actual or prospective injury necessary to support a norm of restraint, and the standard of proof of injury required. The *Trail Smelter* tribunal limited its holding to cases ". . . of serious consequence [where] the injury is established by clear and convincing evidence." In many cases the injury will be prospective

[13] McDougal and Schlei, *loc. cit.* note 12 above, at 694, 694–695, note 241. See also Mercer, "International Law and the French Nuclear Weapons Tests," Pt. 2, 1968 New Zealand Law Rev. 418, 419.

[14] See Read, "The Trail Smelter Dispute," 1963 Canadian Yr. Bk. Int. Law 213, 227–228.

[15] Convention with Canada, *loc. cit.* note 8 above, Art. IV.

[16] 3 Int. Arb. Awards at 1965–1966, 35 A.J.I.L. at 717 (1941). See L. Hydeman and W. Berman, International Control of Nuclear Maritime Activities 278, note 504 (1960).

[17] *Cf.* Secretary General, Survey of International Law in Relation to the Work of Codification of the International Law Commission, U.N. Doc. A/CN.4/1/Rev. 1, at 34 (1949) (duties exemplified by the award in the Trail Smelter Case encompass those "of a preventive nature").

only, and its extent could not be established in advance by clear and convincing evidence.[18] That is the heart of the problem: the consequences of using major new technology cannot be clearly foreseen. If restraint is postponed until there is clear and convincing evidence of serious harm, consequences affecting large areas of common resources may have ensued. In some cases the effect may be irreversible.

The *Trail Smelter* standard would extend comfortably to cases in which the likelihood (rather than the existence) of injury is established by clear and convincing evidence.[19] This, however, does not meet the essence of the problem mentioned above, where the likelihood of serious injury is not fully established. One may wonder whether a disinterested decision-maker thirty years after *Trail Smelter*, in a world awakened to the existence of environmental deterioration, would find the "clear and convincing" standard literally applicable when there are plausible consequences magnified far beyond those considered in that case. It would be consistent with the approach taken by the *Trail Smelter* tribunal to apply a reasonableness test, with potentially greater harm calling for abstention from conduct under a proportionately lesser showing that the harm will occur. Nevertheless, *Trail Smelter* itself does not go so far; at most, by applying essentially a reasonableness standard it points the way to such a result.

Other decisions of international tribunals are marginally relevant at best.[20] The *Trail Smelter Case* stands as the leading case authority, to be tested against expectations arising from the conduct and pronouncements of other decision-makers.

B. *State Practice*

The question at this point is whether national decision-makers in practice involving the United States have conducted themselves in such a way as to reflect or induce expectations of restraint in the use of technology, based on perceptions of harm to the world's common resources. If a state abstains from acting in a certain way or from acting at all in a given situation, it may be for any number of reasons, not all of which have legal significance.[21] But it goes too far to say that abstention within the discretion of a state cannot affect the formation of new custom.[22] The

[18] *Cf.* L. Hydeman and W. Berman, *op. cit.* note 16 above, at 280–281; Taubenfeld, "Nuclear Testing and International Law," 16 Southwestern Law J. 365, 401–402 (1962).

[19] This was the standard applied to prospective damage from water pollution in New York *v.* New Jersey, 256 U.S. 296, 309 (1921), on which the Trail Smelter tribunal relied.

[20] See the Lake Lanoux Arbitration (France *v.* Spain), 12 Int. Arb. Awards 281, 1957 Int. Law Rep. 101, 53 A.J.I.L. 156 (1959); Corfu Channel Case (United Kingdom *v.* Albania), [1949] I.C.J. Rep. 4, 43 A.J.I.L. 558 (1949). In the latter case the Court took note of ". . . every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States." [1949] I.C.J. Rep. at 22. Such language does little to delineate expectations beyond the facts of the case, since it assumes rights in the complaining states.

[21] See, *e.g.*, Case of the S.S. "Lotus," (1927) P.C.I.J., Ser. A, No. 10, at 28; C. Parry, The Sources and Evidences of International Law 63–64 (1965).

[22] See K. Wolfke, Custom in Present International Law 69 (1964), discussing the views of Sørensen.

International Court has relied on state restraint as evidence of the existence of an international norm restricting freedom of action.[23] If freedom of action might plausibly be asserted, and if purely selfish interests would normally be served by action (or by less restraint than is observed), inaction or restrained action is legally significant.[24]

The technologically advanced states (particularly the United States) have on several occasions taken action which has had potentially harmful consequences for common resources. In order to determine whether these preclude the emergence of any meaningful restriction, it will be necessary to examine the degree of restraint observed, the process of claim and reaction set in motion, the interests at stake and the instances in which action might have been taken but was not.[25]

1. *Nuclear Tests in the Atmosphere*

Significantly, those who have asserted the lawfulness of atmospheric nuclear tests (by states not bound by prohibitory treaty obligations) have not spoken in terms of unrestrained freedom of action. Rather, they have relied on a reasonableness standard evidenced by existing state practice. This standard stresses the minimum possible interference with such legitimate interests of non-testing states as use of shipping lanes and fishing rights.[26] Emphasis is given to the vital security interests of the testing state and of those reliant on it for protection.[27] Such a rationale would not extend to environment-endangering unilateral conduct beyond areas of overriding importance to the acting state. Even in the areas of permissible conduct, the rationale dictates the exercise of maximum self-restraint, based on the interests of other states, consistent with the acting state's execution of its vital policy.

[23] Nottebohm Case, [1955] I.C.J. Rep. 4, 21–22. The Court said that the practice of certain states in refraining from extending diplomatic protection to nationals who have severed the links of nationality ". . . manifests the view of these States that, in order to be capable of being invoked against another State, nationality must correspond with the factual situation."

[24] See the separate opinion of Judge Jessup in Barcelona Traction, Light & Power Co., [1970] I.C.J. Rep. 4, 186, asserting that abstention from affording diplomatic protection to companies incorporated in the state but not otherwise linked to it, ". . . being as it were 'against interest,' has special probative value." See also H. Lauterpacht, The Development of International Law by the International Court 380 (1958); Virally, "The Sources of International Law," in Manual of Public International Law 116, 130–131 (M. Sørensen ed., 1968).

[25] We are dealing with events compressed into a relatively short period—roughly since World War II. Nevertheless, the use of technology has provided sufficient opportunities for challenge to permit the formation of legally relevant expectations. See generally Virally, *loc. cit.* note 24 above, at 131–132. *Cf.* North Sea Continental Shelf Cases, *loc. cit.* note 6 above, at 42–43.

[26] See McDougal and Schlei, *loc. cit.* note 12 above, at 682–686.

[27] See M. McDougal and W. Burke, The Public Order of the Oceans 772 (1962); McDougal and Schlei, *loc. cit.* note 12 above, at 690–695; U.S. Delegation Paper for the U.N. Conference on the Law of the Sea, "Legality of Using the High Seas in Connection with Nuclear Weapons Tests in the Pacific Ocean," 4 Whiteman, Digest of International Law 546–550 (1965).

It is significant, also, that atmospheric nuclear testing instigated a process of claim and counterclaim among decision-makers, many of whom have not been willing to accept even such a limited rationale. The counterclaims, culminating in the partial Test Ban Treaty, have increasingly emphasized the environmental hazard.[28] Although the treaty probably would not have emerged, absent a belief by the United States and the Soviet Union that they had substantially accomplished the national security goals attainable from atmospheric testing, rising fears of persistent environmental harm provided the negotiators with considerable incentive to agree.[29] The Test Ban Treaty reflects a growing consensus based on the judgment, shared by the United States and the Soviet Union —though not yet by France and the People's Republic of China—that the political and military benefits from further atmospheric testing are outweighed by the (uncertain) environmental as well as out-of-pocket costs.[30]

2. *Waste Disposal*

Much of the controversy concerning disposal at sea has centered on radioactive wastes. No state has asserted the unrestricted right to dispose of radioactive wastes in the oceans without safeguards.[31] It seems clear that any sizable disposal of low-level radioactive waste in the seas without protection would violate existing norms, as would *any* disposal at sea of high-level radioactive matter.[32]

The response of members of the international community to disposal of even low-level wastes has been instructive. Some have objected flatly to any disposal at sea.[33] Others have been less rigid. None are sanguine

[28] See G.A. Res. 1762A, 17 GAOR Supp. 17, at 3, U.N. Doc. A/5217 (1962); Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, Aug. 5, 1963, Preamble, (1963) 2 U.S.T. 1313, T.I.A.S. No. 5433, 480 U.N.T.S. 43; 57 A.J.I.L. 1026 (1963). See also Report of Subcommittee III of the U.N. Seabed Committee, U.N. Doc. A/AC. 138/62, at 14–16 (1971) (responses to recent French tests).

[29] See A. Dean, Test Ban and Disarmament: The Path of Negotiation 83–84 (1966); H. Jacobson and E. Stein, Diplomats, Scientists, and Politicians 126–127, 346, 381–382, 483 (1966).

[30] Underground testing continues despite fears that some tests are or may be environmentally harmful. Japan and Canada protested the November, 1971, U.S. test at Amchitka Island. See New York Times, Nov. 7, 1971, at 64, col. 4. It appears, however, that no radiation leakage or other significant environmental harm occurred. *Ibid.*, Nov. 8, 1971, at 78, col. 1; Nov. 14, 1971, §4, at 2, col. 3.

[31] See, *e.g.*, statement of the representative of the IAEA, 47 U.N. ECOSOC 196, U.N. Doc. E/SR.1629 (1969); statement of the U.S. delegate, 4 U.N. Conf. on the Law of the Sea 85, U.N. Doc. A/CONF.13/40 (1958). Art. 2 of the Convention on the High Seas requires that freedom of the seas "be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas."

[32] See M. McDougal and W. Burke, *op. cit.* note 27 above, at 861–862. *Cf.* Brown, 'International Law and Marine Pollution: Radioactive Waste and 'Other Hazardous Substances'," 11 Nat. Res. J. 221, 234–235 (1971). For the distinction between high- and low-level wastes, see Ramey, "Radiation Protection—Past, Present and Future," 11 Atomic Energy Law J. 1, 18–24 (1969).

[33] See U.N. Doc. A/CONF.13/C.2/L.118, in 4 U.N. Conf. on the Law of the Sea 149, U.N. Doc. A/CONF.13/40 (1958); summary records of the 29th meeting in *ibid.* 83,

about disposal. The World Health Organization in 1961 adopted a resolution requesting ". . . urgently all the Members . . . to prohibit all discharge of radioactive waste into watercourses or the sea, to the extent that the safety of such discharge has not been proved. . . ." [34] It is noteworthy that the standard adopted was abstention until safety is proved. The United States opposed the W.H.O. resolution, in part on the ground that the resolution prejudged the question of whether pollution had occurred.[35] Yet the United States shortly thereafter acted in a manner consistent with the resolution when it acquiesced in Mexican protests against the proposed issuance of a license to dispose of low-level radioactive waste in the Gulf of Mexico. The license had been conditionally approved, and an Atomic Energy Commission hearing examiner had found that the disposal would create no danger. After the Mexican protests, however, the license was finally denied.[36] Thus the United States responded to a protest based on environmental grounds, and abstained from acting despite the announced and unreversed opinion of an official fact-finder that no danger to the shared environment had been shown.

Community reaction to radioactive waste disposal at sea led to the inclusion of a provision in the Convention on the High Seas obligating parties to "take measures to prevent pollution of the seas from the dumping of radioactive waste. . . ." [37] The meaning of "pollution" was not set forth,[38] and the contemplated measures were not identified. Consequently the measure of the duty is unclear. Nevertheless the provision is couched in terms of duty, and reflects a community standard calling for preventive measures to preserve the ocean environment from a perceived but uncertain harm. Such a general standard does not supply specific guidelines for conduct, but does provide a normative setting for state practice. It is relevant to an attempt to distinguish custom from mere usage when waste disposal conduct is assessed.

85–87 (proposals by members of the Communist bloc). See also M. McDougal and W. Burke, *op. cit.* note 27 above, at 860, note 413 (Soviet Union insists that disposal at sea is unlawful).

[34] W.H.O. Res. WHA/14.56, 14 World Health Assembly, No. 110, Pt. I, at 24 (1961).

[35] 4 Whiteman, Digest of International Law 725–727 (1965).

[36] *Ibid.* 612–618. See In the Matter of Industrial Waste Disposal Corp., 2 A.E.C. Rep. 70 (1962). For further discussion, see L. Hydeman and W. Berman, *op. cit.* note 16 above, at 305; M. McDougal and W. Burke, *op. cit.* note 27 above, at 861.

[37] Convention on the High Seas, Art. 25(1), *loc. cit.* note 11 above. (The convention came into force for the United States after it had denied the Gulf of Mexico license.) It is arguable that Art. 25(1) is a codification of pre-existing customary law. The preamble to the convention speaks of a desire to "codify" existing rules and to adopt provisions which are "generally declaratory of established principles of international law." Compare Baxter, "Multilateral Treaties as Evidence of Customary International Law," 41 Brit. Yr. Bk. Int. Law 275, 289 (1965–1966), doubting that this provision reflected observable custom. See also Baxter, "Treaties and Custom," 129 Hague Academy, Recueil des Cours 25, 54 (1970).

[38] For the definition asserted by the United States, see 4 Whiteman, Digest of International Law 726 (1965).

The United States has issued no new licenses for radioactive waste disposal at sea since 1960.[39] Beginning in 1962, the Atomic Energy Commission has designated land sites for disposal, and sea disposals under pre-1960 licenses have been drastically reduced. Since 1967 no disposals appear to have been made in the Atlantic and only 28 containers (of low-level waste) in the Pacific.[40] The announced reasons for the switch to land disposal stress the expense of adequate containers for sea disposal.[41] The economic rationale, however, does not deprive the switch of normative significance. The fact that expensive containers are required for sea disposal is indicative of the recognition of a need for extreme caution. Economic benefits may have ensued from the change, but much of the impetus came from voiced concern on the part of the international community that sea disposal, despite the lack of a showing of present damage, involves too great a risk of eventual harm. It is virtually inconceivable that the United States could assert a right to revert to its pre-1962 level of sea disposal without evoking widespread international protests on normative grounds, nor is it likely that the United States would attempt to resume large-scale sea disposals even if it became economically advantageous to do so.

The precedent is probably limited to situations in which there is a reasonably available alternative to the potentially deleterious use of the *res communis*, as is the case in the United States with its large land mass providing sites for underground disposal. The United Kingdom and other countries in Western Europe, with relatively small territories, continue to dispose of limited quantities of low-level radioactive waste in the oceans under strict controls and pursuant to international consultations.[42]

Similar questions are raised by disposal of obsolete munitions at sea. The rationale given in 1970 by the United States for ocean dumping of

[39] H.R. Rep. No. 92–361, 92d Cong., 1st Sess. 55 (1971). For national security reasons, the United States continues to operate nuclear-powered naval vessels which occasionally emit very small amounts of radioactivity. The Navy does not permit sea disposal of solid radioactive waste from its nuclear ships. See Hearings on Ocean Waste Disposal before a Subcommittee of the Senate Committee on Commerce, 92d Cong., 1st Sess. 62–75 (1971).

[40] See Council on Environmental Quality, Ocean Dumping: A National Policy 7 (1970); Belter, "Recent Developments in the United States Low-Level Radioactive Waste-Management Program—A Preview for the 1970s," in International Atomic Energy Agency, Symposium on Management of Low- and Intermediate-Level Radioactive Wastes 155, 176 (1970).

[41] *Ibid.* 176–177. There appears to be no showing of present harm from sea disposals of radioactive waste. See 13 I.A.E.A. Bulletin, No. 1, at 26, 27 (1971); Schachter and Serwer, *loc. cit.* note 5 above, at 107.

[42] For U.K. practice, see West, "Operational Experience in the Handling, Treatment and Disposal of Radioactive Wastes at a Research and Development Establishment," in I.A.E.A. Symposium, *op. cit.* note 40 above, at 235, 243–245; Royal Comm'n. on Environmental Pollution, 1st Report, Cmnd. No. 4585, at 25 (1971). The Soviet Union, with its large land mass, does not dispose of radioactive waste at sea. See W. Butler, The Soviet Union and the Law of the Sea 187 (1971). The United States has recognized the need for a reasonable alternative before ocean disposal of municipal waste can be fully discontinued. See Hearings, *op. cit.* note 39 above, at 265, 283.

nerve gas was restricted to strictly controlled disposal of a limited quantity of a substance which could not feasibly be disposed of in any other manner.[43] There was no claim of right to engage in systematic disposal. Even such a circumscribed proposal evoked protests on normative grounds from the U.N. Secretary General, based on community expectations of co-operation in the preservation of ocean environmental quality.[44] Moreover, the U.N. Seabed Committee formally registered its concern, and appealed to all governments ". . . to refrain from using the sea-bed and ocean floor as a dumping ground for toxic, radio-active and other noxious materials which might cause serious damage to the marine environment." [45] The United States subsequently announced that it was suspending ocean disposal of munitions on the ground that too many environmental questions were unanswered.[46] Evolving U.S. practice concerning munitions disposal thus reinforces the radioactive waste precedent. In each case the clear evolution is toward a duty to abstain even though the probability of actual harm is not objectively established.

The United States has permitted disposal of municipal and industrial waste in the oceans in quantities which appear to have caused some harm.[47] The harm, however, has been relatively localized and apparently has thus far affected primarily the interests of the United States. At this writing, it appeared that Federal legislation would be enacted to control such disposal.[48] Similarly, the United States has proposed a draft ocean

[43] See New York Times, July 30, 1970, at 11, col. 1 (City ed.); *ibid.*, Aug. 4, 1970, at 1, col. 4.

[44] *Ibid.*, Aug. 8, 1970, at 8, col. 6. The protest was based in part on Art. 25(2) of the Convention on the High Seas, discussed in the text at note 138 below. See also Brown, *loc. cit.* note 32 above, at 253–254. Iceland officially protested against the disposal, and the Government of the Bahamas made similar representations to the U.K. and the U.S. See 18 Keesing's Contemporary Archives 24386 (Jan. 9–16, 1971). The U.S. Department of State had determined (as required by U.S. law) that the disposal would not violate international law. It focused primarily on the duty laid down in Art. 2 of the Convention on the High Seas to have reasonable regard for the interests of other states in exercising freedom of the seas. See Hearings on Dumping of Nerve Gas Rockets in the Ocean before a Subcommittee of the Senate Committee on Commerce, 91st Cong., 2d Sess. 65 (1970).

[45] Report of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction, 25 U.N. GAOR Supp. 21, at 8, U.N. Doc. A/8021 (1970).

[46] See Hearings, *op. cit.* note 39 above, at 51–52.

[47] See Council on Environmental Quality, *op. cit.* note 40 above, at 12–15. The oceans have the capacity to absorb some municipal and industrial waste without harm. Thus the issue is not whether these wastes may be discharged, but whether they may be discharged in such a manner as to risk overtaxing the absorptive capacity in any given ocean area.

[48] H. R. 9727, 92d Cong., 1st Sess., had passed both Houses of Congress in somewhat different forms. See 117 Cong. Rec. H 8225-55, S 19629-55 (daily ed., Sept. 9, Nov. 24, 1971). The legislation also curbs U. S. disposal of high-level radioactive wastes and ecologically harmful warfare agents. Rising international expectations are reflected in the call by Sweden, Norway, Finland, Denmark and Iceland for an end to disposal of harmful chemical and industrial waste in international waters. They have announced plans to enact legislation to that effect, and Sweden has now done so. See The Times

dumping convention that would require parties to prohibit transportation of all material for ocean dumping unless a permit is obtained from a national agency applying environmental standards set forth in the convention.[49] U.S. practice therefore does not run counter to expectations of restraint when large-scale environmental consequences are at stake, and is turning toward an approach which, in the words of a U.S. official, is "aimed at terminating all dumping not clearly demonstrated to be safe." [50]

Oil tankers provide yet another means involving the United States by which ocean disposal of pollutants occurs. "Super tankers" pose ocean environmental challenges not only from the danger of shipwreck but also from discharge of oil in normal operations.[51] International preventive practice is developing around the nucleus of the International Convention for the Prevention of Pollution of the Sea by Oil.[52] The convention prohibits discharges of oil or oily mixtures, subject to exceptions for reasonable discharges under designated conditions. It provides some standards as to quantity and location of permissible discharges,[53] but sets forth only in very general terms the means by which discharges are to be avoided.[54] Yet specific precautions for the control of discharges are evolving in practice. In particular, most tanker operators, acting with the approval of the major maritime states, have adopted the "load on top" system to retain

London), April 28, 1971, at 1, col. 2; Washington Post, Nov. 13, 1971, at A4, col. 8. The Government of The Netherlands has responded to international protests by instructing a Dutch firm to abandon its plan to dump 600 tons of chemical waste in the North Atlantic. See The Times (London), July 23, 1971, at 1, col. 2.

[49] See draft Regulation of Transportation for Ocean Dumping Convention Arts. I, III, 10 Int. Legal Materials 1021 (1971).

[50] Statement of William Ruckelshaus, Administrator, Environmental Protection Agency, in Hearings, *op. cit.* note 39 above, at 265. To the same effect, see Dept. of State Position Paper, in Hearings on Ocean Dumping of Waste Materials before Subcommittees of the House Committee on Merchant Marine and Fisheries, 92d Cong., 1st Sess. 115, 116 (1971). The U.S. Government's Committee on International Environmental Affairs has taken the view that any ocean disposal of wastes which "threatens life or directly damages property violates international law." Dept. of State, Suggestions Developed Within the U.S. Government for Consideration by the Secretary General of the 1972 U.N. Conference on Human Environment 59 (1971).

[51] For a concise discussion of the challenge, see Study of Critical Environmental Problems, Man's Impact on the Global Environment 139–143 (report of M.I.T.-sponsored study group, 1970).

[52] May 12, 1954, (1961) 3 U.S.T. 2989, T.I.A.S. No. 4900, 327 U.N.T.S. 3, as amended April 11, 1962, (1966) 2 U.S.T. 1523, T.I.A.S. No. 6109, and Oct. 21, 1969, 9 Int. Legal Materials 1 (1970). The 1969 amendments are not yet in force. *Cf.* International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, Nov. 29, 1969, 64 A.J.I.L. 471 (1970), 9 Int. Legal Materials 25 (1970); International Convention on Civil Liability for Oil Pollution Damage, Nov. 29, 1969, 64 A.J.I.L. 481 (1970), 9 Int. Legal Materials 45 (1970).

[53] Under the 1969 amendments tankers could discharge oil or oily mixtures only beyond 50 miles from land, and then only in designated quantities which are thought not to cause persistent pollution. See 9 Int. Legal Materials 1, 4 (1970); IMCO Bulletin No. 13, at 7, 9 (1970). The United States has ratified the 1969 amendments. See 65 Dept. of State Bulletin 575–576 (1971).

[54] See Arts. VII and VIII.

on board oil washed from tanks in the cleaning process.[55] Oily mixtures from ballasting and washing cargo tanks are collected in special tanks, where the oil is allowed to separate from the water. The water is discharged, but the oil is retained and fresh crude oil is loaded on top of it. The residues and the fresh oil are eventually discharged at the refinery.[56]

Such practice, against a backdrop of a multilateral convention providing general environmental standards, would appear to justify expectations regarding the conduct of all flag states parties to the convention, and may even represent a sufficient consensus on the existence of a norm to bind non-parties. The binding effect stems from a broader normative principle embodied in the convention—that of avoiding discharge of oil[57] —which has been given a specific application through widely adopted practice. In view of the high visibility of the problem and of the measures taken, and the absence of protests, a binding norm could be established in a relatively short time.

3. *The Ocean Floor*

Ocean floor operations have consisted primarily of oil exploration and extraction. Until the Santa Barbara blowout, the U.S. Government appears not to have faced squarely the dangers to the marine environment involved in ocean bed oil exploitation.[58] The result was an oil spill which caused significant ocean pollution.[59]

The Santa Barbara incident has influenced new Federal standards and procedures to prevent ocean pollution from off-shore drilling. More stringent requirements for pre-drilling geological reports have been promulgated,[60] as have regulations intensifying standards for drilling pro-

[55] See Royal Comm'n. on Environmental Pollution, *op. cit.* note 42 above, at 26; IMCO Bulletin No. 13, at 7–8. The "load on top" system, though widely recognized as an effective and desirable anti-pollution measure, may be in technical contravention of the convention. See IMCO Bulletin No. 13, at 8. It would not contravene the convention once the 1969 amendments come into force, nor is it likely to be considered by any party to involve a substantive present violation. On the contrary, as argued in the text, it may well be mandatory for parties to the convention.

[56] NATO members have taken a further step by agreeing to achieve by 1975 "the elimination of intentional discharges of oil and oily wastes into the sea. . . ." 63 Dept. of State Bulletin 669 (1970).

[57] Also relevant is the Convention on the High Seas, Art. 24, *loc. cit.* note 11 above, which calls on member states to "draw up regulations to prevent pollution of the seas by the discharge of oil by ships . . ." This is arguably a statement of customary law. See note 37 above.

[58] See Baldwin, "The Santa Barbara Oil Spill," 42 Colo. Law Rev. 33 (1970). The Federal Government issues leases for oil explorations beyond three miles from shore, under the Outer Continental Shelf Lands Act, *loc. cit.* note 11 above. The Act authorizes issuance of regulations "to provide for the prevention of waste and conservation of the natural resources of the outer Continental Shelf . . ." *Ibid.* §1334(a) (1).

[59] See Baldwin, *loc. cit.* note 58 above, at 52–53. At least two previous blowouts from wells in the United States' continental shelf resulted in significant pollution. See Hearings on S. 7 and S. 544 before a Subcommittee of the Senate Committee on Public Works, 91st Cong., 1st Sess., Pt. 3, at 811 (1969).

[60] See 30 C.F.R. §§250.34, 250.91 (1971).

cedures and equipment to prevent blowouts.[61] Tightened pre-leasing environmental evaluation procedures have been adopted.[62] Although it is too early to tell whether these measures will be fully adequate to prevent ocean damage from oil leasing activities, they are a significant step in that direction. They embody a governmental policy to restrain freedom of action in seabed areas under effective U.S. control, taken despite economic counterpressures within the United States.[63]

The environmental interests directly affected are primarily those of the United States, since the immediate damage has been confined largely to the U.S. coastline and coastal waters. This does not, however, deprive the response of significance to the evolution of international norms. In part the international significance is found in the context of the Geneva Conventions discussed below. But the response also has precedential value if future questions arise concerning U.S. regulation of seabed activities which are subject to its control, and which pose more direct environmental challenges to the interests of other states. It would be difficult to argue in such a case that lesser standards are appropriate.[64]

The United States is a party to several multilateral treaties which require that account be taken of environmental considerations in seabed operations. Article 5(1) of the Convention on the Continental Shelf may have been violated by United States failure to adopt safeguards adequate to prevent the Santa Barbara incident. It provides that: "The exploration of the continental shelf and the exploitation of its natural resources must not result in any unjustifiable interference with navigation, fishing or the conservation of the living resources of the sea. . . ."[65] The language is couched in mandatory terms, and may reflect a pre-existing norm.[66]

It is probable that the Santa Barbara spill involved "interference with . . . the conservation of the living resources of the sea," within the meaning of Article 5(1).[67] The major question is whether such interference is

[61] 30 C.F.R. §250.41 (1971).

[62] 43 C.F.R. §3301.4 (1971). Moreover, the lessee is now subject to potential liability for cleaning-up expenses. See Water Quality Improvement Act of 1970, 33 U.S.C.A. §1161(f) (3) (1970); 30 C.F.R. §250.43(b) (1971).

[63] Baldwin, *loc. cit.* note 58 above, at 59–60. The 1970 Gulf of Mexico oil discharges resulted from ventures in operation when the measures were adopted. See, generally, Nanda and Stiles, "Offshore Oil Spills: An Evaluation of Recent United States Responses," 7 San Diego Law Rev. 519, 534–536 (1970).

[64] *Cf.* Lester, "River Pollution in International Law," 57 A.J.I.L. 828, 852 (1963).

[65] *Loc. cit.* note 11 above.

[66] In the North Sea Continental Shelf Cases, *loc. cit.* note 6 above, at 39, the I.C.J., referring *inter alia* to Art. 5(1), said that the ". . . general obligation not unjustifiably to interfere with freedom of navigation, fishing, and so on" was received customary law. The conservation provision of Art. 5(1) would presumably be included within the phrase "and so on," though the Court may not have given that its considered judgment. *Cf.* Baxter, "Treaties and Custom," *loc. cit.* note 37 above, at 43–49.

[67] The primary conservation thrust of Art. 5(1) is the protection of fish stocks. See U.N. Doc. A/CN.4/SR.378, 1956 I.L.C. Yearbook (I) 272, 277. There was very little direct fish-kill, if any, from the Santa Barbara incident, though over 1,000 sea birds were killed and the danger of long-term accumulation of hydrocarbons in the aquatic food chain was greatly increased. See Baldwin, *loc. cit.* note 58 above, at 36–37; Study of

"unjustifiable." The terms of the convention, buttressed by the *travaux*, make it clear that no absolute duty of non-interference was intended.[68] However, the International Law Commission stated the duty rather strictly: "With regard to the conservation of the living resources of the sea, everything possible should be done to prevent damage by exploitation of the subsoil. . . ." [69] At the very least, it would seem "unjustifiable" to fail to adopt safeguards which take full account of the magnitude of potential harm if a reasonably foreseeable accident occurs, the availability of devices or techniques capable of preventing mishap, and the geological or other physical characteristics of the area.

Article 5(7) of the Convention on the Continental Shelf obligates the coastal state to undertake, in safety zones established around devices on the shelf, "all appropriate measures" for the protection of the living resources of the sea from harmful agents. Here again the extent of the duty is not well defined. It has been suggested that this has simply had the effect of requiring operators to observe "good oil industry practice" and to provide equipment to stem the flow if a blowout occurs.[70] It is probable, however, that as a result of Santa Barbara and of the consequent measures adopted by the United States, expectations are being formed regarding more stringent standards of prevention. As in the case of Article 5(1), however, precise mandatory standards do not yet exist.[71]

Article 24 of the Convention on the High Seas provides that "Every State shall draw up regulations to prevent pollution of the seas," not only by the discharge of oil from ships or pipelines, but also "resulting from the exploitation or exploration of the seabed and its subsoil. . . ." As elsewhere in the High Seas Convention, the meaning of "pollution" is left unclear.[72] The contemplated regulations need not prohibit the introduction into the sea of all pollutants, in the absence of known or

---

Critical Environmental Problems, *op. cit.* note 51 above. The terms of Art. 5(1) are broad enough to encompass these effects. The *travaux*, cited above, do not rule out extension beyond direct fish-kills. It would be anomalous to construe Art. 5(1) to apply to fish-kills but not to the accumulation in edible fish of substances dangerous to man.

[68] Art. 5(1) also refers to non-interference with scientific research, omitting the word "unjustifiable." An attempt in the drafting stage to strike the word from the "navigation, fishing or conservation" provision was rejected. See 6 U.N. Conf. on the Law of the Sea 84–85, 90, U.N. Doc. A/CONF.13/42 (1958). See also *ibid.* 82, 88; I.L.C. Report, U.N. Doc. A/3159, 1956 I.L.C. Yearbook (II) 253, 299.

[69] *Ibid.*

[70] Hardy, *loc. cit.* note 2 above, at 331.

[71] The *travaux* relating to Art. 5(7) offer little help, since it was not in the I.L.C. draft.

[72] The Intergovernmental Oceanographic Commission of UNESCO has proposed a definition of marine pollution which could serve as a guide to interpretation, *mutatis mutandis*, in the absence of a more authoritative definition: "Introduction by man, directly or indirectly, of substances or energy into the marine environment (including estuaries) resulting in such deleterious effects as harm to living resources, hazard to human health, hindrance to marine activities including fishing, impairing the quality for use of sea water and reduction of amenities." Report on Long-Term and Expanded Programme of Oceanographic Research, U.N. Doc. A/7750, at 25 (1969). *Cf.* Report by the World Health Organization, Environmental Pollution and Its Control, U.N. Doc. E/4457, at 2 (1968).

scientifically postulated damage. To do so would be effectively to prohibit all seabed activities.[73] Some affirmative action is required, however, to prevent damage from ocean pollution. Protection would not be limited to the "living resources of the sea," as that phrase is used in the Convention on the Continental Shelf.[74] In a broad sense, the High Seas Convention reflects a community expectation that steps will be taken, in advance of proven damage, to prevent harm by pollution to man's interest in the marine environment.

Significant also is the General Assembly's 1970 Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction.[75] Regarding protection of the marine environment, it provides that:

> With respect to activities in the [seabed] area and acting in conformity with the international regime to be established, States shall take appropriate measures for and shall co-operate in the adoption and implementation of international rules, standards and procedures for, *inter alia*: (a) The prevention of pollution and contamination, and other hazards to the marine environment, including the coastline, and of interference with the ecological balance of the marine environment; (b) The protection and conservation of the natural resources of the area and prevention of damage to the flora and fauna of the marine environment.

The Declaration is based on the precept that there is an area of the seabed that is *res communis*.[76] It is couched in mandatory terms, and was adopted without formal dissent. It looks toward the creation of an international regime, but enunciates a duty to take anti-pollution and conservation measures without conditioning the duty entirely on the acts of such an eventual regime. Taken as a whole it reads like a constitutional document, complete with carefully drawn exceptions.[77] Even if one were to consider it without regard to the existing conventions on the law of the sea, it might well be found to have a "quasi-legislative" character[78] achieved through the familiar legislative process of bargaining and compromise.[79]

[73] See Report of the Secretary General, *loc. cit.* note 5 above, at 112. Compare note 72 above.

[74] See I.L.C. Report, *loc. cit.* note 68 above, at 286.

[75] G.A. Res. 2749, par. 11, *loc. cit.* note 4 above, adopted by a vote of 108 to none, with 14 abstentions. The U.S. voted in favor. See 64 Dept. of State Bulletin 155 (1971).

[76] G.A. Res. 2749, *passim* and especially par. 1.

[77] It is considerably more legislative in tone than, for example, the Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, G.A. Res. 1962, 18 U.N. GAOR Supp. 15, at 15, U.N. Doc. A/5515 (1963); 58 A.J.I.L. 477 (1964).

[78] See Falk, "On the Quasi-Legislative Competence of the General Assembly," 60 A.J.I.L. 782 (1966). *Cf.* D'Amato, "On Consensus," 8 Canadian Yr. Bk. Int. Law 104, 113–115 (1970). For discussion of the Declaration in the context of the existing conventions on the law of the sea, see text at note 82 below.

[79] See remarks by the Australian representative to the General Assembly's First Committee, U.N. Doc. A/C.1/PV.1777, at 26 (1970).

Given these circumstances, it seems clear that the Declaration—or, more accurately, the shared values it embodies—will influence the behavior of nations even before the creation of any international seabed regime, and will do so with greater force than that of a mere recommendation.[80] This is not to assert that it provides clear rules to be applied to all cases. For example, it is expressly applicable only to the ill-defined area "beyond the limits of national jurisdiction," and it does not define such key terms as "pollution," "hazards" and "marine environment." But its restriction to areas beyond the limits of national jurisdiction is relevant primarily to the non-conservation provisions, such as those concerning the sharing of benefits from seabed exploitation. Moreover, conservation terms in the Declaration such as "ecological balance of the marine environment" have sufficient meaning to provide a standard for assertions of impermissibility in certain instances, as, for example, when scientific opinion indicates that given underwater activities are likely to interfere with the aquatic food chain. It is reasonable, therefore, to view the conservation provisions as an expression of community expectation that underwater activities, including those on the continental shelf, will be conducted with a genuine regard for at least those resources that are clearly part of the marine environment.[81]

It is important also to consider the Declaration in light of the conventions on the law of the sea. The term "appropriate measures" is the same as that used in Article 5(7) of the Convention on the Continental Shelf.[82] The reference to prevention of pollution in the seabed area meshes with Article 24 of the Convention on the High Seas.[83] The Declaration, however, encompasses a broader range of environmental interests to be protected. Its significance to the conventions appears to lie not primarily as an aid to their interpretation, but as a buttress to the argument that their underwater conservation provisions now reflect custom, whether or not they originally did, and however general the custom may be. The

[80] This is probable despite the view voiced by some representatives that the Declaration would not have binding legal effect. See U.N. Docs. A/C.1/PV.1777, at 27 (Australia); A/C.1/PV.1779, at 7 (Canada); *ibid.* 39–40 (Italy); A/C.1/PV.1788, at 28 (Belgium). *Cf.* statement by Mr. Amerasinghe, Chairman of the Committee on the Peaceful Uses of the Sea-Bed, U.N. Doc. A/PV.1933, at 99–100 (1970). Such views are accurate in the sense that the Declaration does not *ipso facto* become law upon adoption. Its legal effect is more subtle, but is likely to be felt even in the face of advance disclaimers. *Cf.* Schachter, "The Relation of Law, Politics and Action in the United Nations," 109 Hague Academy, Recueil des Cours 165, 181–184 (1963); Higgins, "The United Nations and Lawmaking: The Political Organs," 64 A.J.I.L. (Proceedings) at 37, 40–42 (1970).

[81] As a matter of common understanding, the marine environment would include the waters of the high seas and the seabeds. The Declaration provides that it also includes the coastline.

[82] See text at note 70 above. The Declaration may also provide a partial gauge of what is required to avoid "unjustifiable interference" with conservation, under Art. 5(1) of that convention. See text at note 65 above. The Declaration is relevant to the evaluation of conduct under the Continenal Shelf Convention even though it asserts its coverage only for the seabed "beyond the limits of national jurisdiction." See text following note 80 above.

[83] See text preceding note 72 above.

Declaration and the conventions are in fact synergistic, embodying similar values concerning environmental preservation, each strengthening the prescriptive authority of the others vis-à-vis all members of the world community.

The United States moved from participant to initiator in multinational seabed environmental practice with its proposal of detailed draft seabed treaty provisions concerning, *inter alia*, preservation of the marine environment.[84] The draft provisions warn that they do not necessarily represent the definitive views of the government. They are nevertheless noteworthy for their forthright statement of a duty to conduct all activities "with strict and adequate safeguards for the protection of . . . the marine environment," [85] and for their contemplation of international machinery to formulate and prescribe specific rules designed to avoid marine damage.[86] The statement of the duty to conduct seabed activities with "strict and adequate safeguards" will inevitably play a part in the formulation of community assertions about permissible United States conduct (and of reciprocal United States assertions) before the advent of a convention on the subject. As in the case of all the seabed environmental measures we have considered, recognition of even such a general duty serves not only to counter any assertion of a right based on freedom of the seas to proceed without regard to environmental considerations, but also reinforces the normative expectation that seabed activities will not be undertaken at all without safeguards effective under the circumstances to prevent significant, reasonably foreseeable harm to the marine environment.

The United States draft treaty provisions and the U.N. Declaration are, of course, threads in a fabric of rapidly growing international concern over the effect of seabed activities on the marine environment. Additional manifestations involving the United States include consideration of the problem by the Legal Subcommittee of the U.N. Committee on Peaceful Uses of the Seabed and the Ocean Floor; [87] studies by the U.N. Secretariat on seabed pollution problems, including the legal aspects; [88] proposed consideration by the 1973 Conference on the Law of the Sea of ". . . the preservation of the marine environment (including . . . the question of

[84] See Draft of United Nations Convention on the International Seabed Area, 25 U.N. GAOR Supp. 21, Annex V, U.N. Doc. A/8021 (1970). Compare Draft Ocean Space Treaty (Malta), Arts. 58, 60, 72, 74, U.N. Doc. A/AC.138/53 (1971).

[85] U.S. Draft Art. 9. See also Draft Art. 22. "Marine environment" is not defined, an omission noted with some concern in Auburn, "The International Seabed Area," 20 Int. and Comp. Law Q. 173, 189 (1971). But see note 81 above.

[86] U.S. Draft Arts. 23, 68(1) (d) and (e).

[87] See, *e.g.*, the Committee's Reports, 24 U.N. GAOR Supp. 22, at 31, U.N. Doc. A/7622 (1969); 1970 Report, *loc. cit.* note 45 above, at 7–11; Report of Subcommittee III, *op. cit.* note 28 above.

[88] See, *e.g.*, Reports of the Secretary General: Study on International Machinery, *loc. cit.* note 5 above; The Sea: Prevention and Control of Marine Pollution, U.N. Doc. E/5003 (1971); Marine Pollution and Other Hazardous and Harmful Effects . . . , U.N. Doc. A/7924 (1970); Study on the Question of Establishing in Due Time Appropriate International Machinery. . . . , 24 U.N. GAOR Supp. 22, Annex II, U.N. Doc. A/7622 (1969).

pollution) . . . ."; [89] sponsorship by the Intergovernmental Maritime Consultative Organization of a conference on marine pollution in 1973, and IMCO's exhortation to member states to apply effective control measures for preventing marine pollution; [90] and recognition of the pollution-avoidance aspect of the Treaty on the Prohibition of the Emplacement of Nuclear Weapons and other Weapons of Mass Destruction on the Sea-Bed and Ocean Floor and in the Subsoil Thereof.[91]

With increasing manifestations of concern come more stringent community expectations as to what interference is "justifiable" and what measures are "appropriate" under existing conventions. Their application would not necessarily be limited to oil-drilling activities. The cumulative effect of the practice and pronouncements reviewed above seems sufficient to generate expectations that protective measures will be adequate to prevent harmful consequences which may reasonably be anticipated even though they may not be fully understood. Such expectations may extend to conduct in other shared environments when the risk is comparable to that perceived in connection with seabed activities.

4. *Outer Space*

In 1960 the United States announced its intention to place 350 million tiny needles in a short-lived orbit to determine their utility as relayers of military and other communications.[92] Despite opposition from such groups as the International Scientific Radio Union and the International Astronomical Union, the United States went ahead with the experiment. After an abortive first try, and after further international protests, orbit was achieved in 1963.[93] The protests appear to have been based in part on the assertion of a duty not to interfere with the activities of other states.[94]

Although the "space needles" apparently produced no lasting detrimental effect, the scientific community called for more thorough evaluation internationally before similar experiments were undertaken.[95] The United States indicated its willingness to enter into "appropriate international consultations before proceeding with a space activity if it had reason to believe that its activity may create a significant risk of harm." [96] The

[89] G.A. Res. 2750C, 25 U.N. GAOR Supp. 28, at 26, U.N. Doc. A/8028 (1970).

[90] See I.M.C.O. Res. A.176(VI), I.M.C.O. Assembly Resolutions and Other Decisions 124–25 (1969). For further discussion of proposed international action on marine pollution, see Hardy, *loc. cit.* note 2 above, at 337–344.

[91] See U.N. Doc. A/AC.138/SR.12, at 4 (1969) (remarks of the Soviet representative to the Seabed Committee). The treaty is not yet in force.

[92] See S. Doc. No. 56, 89th Cong., 1st Sess. 390, 396 (1965); R. Gardner, In Pursuit of World Order 216 (rev. ed., 1966).

[93] S. Doc. No. 56, *loc. cit.* See G. Gál, Space Law 146–147 (1969); Mouton, "The Impact of Science on International Law," 119 Hague Academy, Recueil des Cours 183, 238 (1966).

[94] See Darwin, "The Outer Space Treaty," 42 Brit. Yr. Bk. Int. Law 278, 281 (1967).

[95] For the formal statement of concern by the international scientific community, see Statement on Belts of Orbiting Dipoles . . . in S. Doc. No. 56, *op. cit.* note 92 above, at 396–397.

[96] Gardner, "Outer Space: Problems of Law and Power," 49 Dept. of State Bulletin 367, 369 (1963). *Cf.* Treaty on Principles Governing the Activities of States in the Ex-

space needles experiment has not been repeated. More significantly, the United States has abandoned a proposal to orbit a "space mirror," even though the National Research Council's Space Science Board found no overwhelming evidence that damage would result.[97] As in the case of the space needles, there appears to have been a military purpose for the experiment, this time involving the illumination of certain areas on the earth. The international scientific community feared that the reflection of sunlight could influence patterns of life on earth.[98]

A particularly serious challenge to the space environment has occurred in connection with high altitude nuclear explosions. The Starfish explosion by the United States in 1962 introduced a massive dose of electrons into a stable portion of the Van Allen magnetic belt. The result has been long-term disruption of natural phenomena and interference with scientific observations. This occurred despite advance assurances from American scientists that there would be no lasting influence on the earth's environment.[99] International response was vigorous, reflecting the conviction of many states ". . . that no interference with the natural state of the [outer space] environment in the name of scientific investigation . . . is tolerable even if no specific damage can be shown." [100] Nuclear explosions in space, of course, are now proscribed, at least among parties to the partial Test Ban Treaty.[101]

Concern about possible detrimental environmental effects of outer space activities has also focused on man's space explorations. The 1967 Outer Space Treaty contains a broad standard of environmental conduct:

> States Parties to the Treaty shall pursue studies of outer space, including the Moon and other celestial bodies, and conduct exploration of them so as to avoid their harmful contamination and also adverse changes in the environment of the Earth resulting from the introduction of extra-terrestrial matter and, where necessary, shall adopt appropriate measures for this purpose.[102]

---

ploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, Art. IX, (1967) 3 U.S.T. 2410, T.I.A.S. No. 6347, 61 A.J.I.L. 644 (1967) (parties have a duty to consult if they have reason to believe that their planned space activities "would cause potentially harmful interference with activities of other States Parties in the peaceful exploration and use of outer space . . ."). The treaty language is based on G.A. Res. 1962, par. 6, *loc. cit.* note 77 above, which was prompted in part by international reaction to the U.S. "space needles" experiment. See S. H. Lay and H. J. Taubenfeld, The Law Relating to Activities of Man in Space 189 (1970).

[97] See R. and H. J. Taubenfeld, The International Implications of Weather Modification Activities 50 (unpublished study for the Dept. of State Office of External Research, 1968).

[98] See Lovell, "The Pollution of Space," 79 The Listener 823, 830 (1968). Scientific objections to the space needles experiment were primarily concerned with the effect on astronomy. *Ibid.* 829.

[99] *Ibid.* 829–830.

[100] R. and H. J. Taubenfeld, "Some International Implications of Weather Modification Activities," 23 Int. Organization 808, 828 (1969).

[101] Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and under Water, Art. I. *Loc. cit.* note 28 above.

[102] *Loc. cit.* note 96 above.

As in the case of explicitly formulated community standards concern the ocean environment, the operative language is quite general. But is not devoid of meaning.[103]

Two distinct environmental hazards are contemplated by the treaty: harmful contamination of outer space, including celestial bodies, and adverse changes in the environment of the earth.[104] Scientific attention has been directed to the former for some time. In 1964 a Consultative Group of the Committee on Space Research of the International Council of Scientific Unions (COSPAR) recommended that, for Mars and other planets where there is a chance that terrestrial life might be sustained, measures should be taken to reduce the probability of a single viable organism being aboard a landing craft to less than one in 10,000. For unsterilized fly-by the probability recommended was three in 100,000.[105] Conditions on the moon were thought sufficiently harsh to exclude the possibility of biological contamination of the surface, and less rigorous (as well as less specific) standards were thus recommended.[106] In 1966 COSPAR again considered these questions. It retained its commitment to the avoidance of planetary contamination, but refrained from enunciating standards such as those set forth by the Consultative Group in 1964. The rationale was that decisions on how to avoid contamination were best left to the nations involved.[107] The inference has consequently been drawn that the Outer Space Treaty does not incorporate the 1964 standards.[108] Such a conclusion seems inescapable.

Even though it may not be possible to postulate specific rules prescribed by the treaty, broadly recognizable standards seem to be evolving from U.S. practice. Thus it appears that the United States has accepted roughly the 1964 COSPAR standards for explorations in the vicinity of Mars, the planet most likely to sustain terrestrial life.[109] U.S. scientists made efforts before the first lunar landing to reduce the contamination effects of the landing, but there was some inevitable contamination from rocket exhaust and cabin leakage.[110] This probably was not "harmful contamination"

[103] Its significance with respect to U.S. lunar and interplanetary probes is explored below. In addition, it has been argued that the language would prohibit a repetition of the space needles experiment. See G. Gál, *op. cit.* note 93 above, at 154.

[104] See, generally, Brooks, "Legal Aspects of the Lunar Landings," 4 Int. Lawyer 415, 420–424 (1970); M. McDougal, H. Lasswell and I. Vlasic, *op. cit.* note 6 above, at 534–536.

[105] See Report of COSPAR Consultative Group on the Potentially Harmful Effects of Space Experiments, U.N. Doc. A/AC.105/20, Annex III, at 14–15 (1964); Brooks, *loc. cit.* note 104 above, at 421.

[106] See Report of COSPAR Consultative Group, *op. cit.* at 15–16.

[107] See Brooks, *loc. cit.* note 104 above, at 421.

[108] *Ibid.* 422.

[109] See Lovell, "The Dangers of Polluting the Planets," The Times (London), Feb. 10, 1969, at 9, col. 7; Johnson, "Pollution and Contamination in Space," in Law and Politics in Space 37, 45–46 (M. Cohen ed., 1964).

[110] See Brooks, *loc. cit.* note 104 above, at 422.

within the meaning of the treaty,[111] nor is it likely that contamination from more recent U.S. lunar expeditions has been "harmful."

United States practice therefore suggests that more stringent standards are applicable to exploration of planets with life-sustaining potentialities than to more hostile bodies such as the moon. It is doubtful that the 1964 COSPAR standards have attained normative status through U.S. practice,[112] but it does appear that the United States recognizes the need—and perhaps the duty—for rigorous sterilization procedures when the risk of biological contamination is substantial.

Relatively strenuous efforts were made to avoid adverse consequences for the earth's environment from the return of the first Apollo lunar missions. These efforts took the form of quarantine and testing procedures for astronauts and for the inanimate materials brought back with them. Nevertheless, some doubts about their adequacy were raised. It was questioned whether enough could be learned during a 21-day quarantine, and whether a sufficient degree of decontamination could be achieved, to insure against subtle and difficult-to-diagnose effects on complex biological-ecological earth systems.[113] Doubts have also been expressed about the propriety of venting command modules during descent toward earth, and about the manner of opening the hatch after splash-down.[114] United States decision-makers have not regarded these doubts as overriding. They have in fact determined that tests from Apollo missions have demonstrated the harmlessness of lunar materials, justifying discontinuance of the quarantine procedure.[115] It does not appear that there have been protests from foreign governments on any of these points.[116]

U.S. practice with respect to space activities does not extend to recognition of a requirement of abstention from all potentially harmful procedures until harmlessness is conclusively demonstrated. Nevertheless, the United States has observed a very considerable degree of caution in recent years. When the environmental risk has appeared greatly to outweigh the potential benefit, and has been brought home by forceful international

[111] The meaning of "harmful" has to be judged by reference to the uses to which the moon is to be put. See Brooks, *loc. cit.* These are not fully known as yet. One such use might be as a platform for astronomy, with which lingering exhaust gases could interfere. It is highly unlikely, however, that gases from lunar operations to date could affect such an eventual use.

[112] Soviet space probes apparently have not been conducted in accordance with the 1964 COSPAR standards. See Lovell, *loc. cit.* note 109 above, col. 6. Soviet authorities, however, have shown an awareness of the need to avoid space contamination. See G. Gál, *op. cit.* note 93 above, at 151; S. H. Lay and H. J. Taubenfeld, *op. cit.* note 96 above, at 189, note 43; U.S.S.R. Draft Treaty Concerning the Moon, Art. IV, U.N. Doc. A/C.1/L.568 (1971).

[113] Alexander, "Possible Contamination of Earth by Lunar or Martian Life," 222 Nature 432 (1969).

[114] See Brooks, *loc. cit.* note 104 above, at 423.

[115] See New York Times, April 29, 1971, at 43, col. 1. No viable organisms have been found in lunar materials. See Lunar Sample Preliminary Examination Team, "Preliminary Examination of Lunar Samples from Apollo 14," 173 Science 681, 691 (1971).

[116] Letter from Richard H. Campbell, Office of Space, Atmospheric and Marine Science Affairs, U.S. Department of State, to the author, June 3, 1971.

protests, as in the case of further high-altitude nuclear explosions or the proposed space mirror experiment, the United States has ultimately abstained. Moreover, its announcement in the aftermath of the space needles incident of an intention to consult internationally in advance, if it has reason to believe that its activity "may" create a significant risk of harm,[117] is an acknowledgment of a restraint that could enable non-participant states to influence the outcome by stressing their apprehension of environmental risks which might otherwise be brushed aside.[118] Recognition of the desirability of advance international consultations in the face of only a possibility that a significant risk will be created also tends to establish that such consultations are measures "appropriate" for avoidance of harmful contamination or adverse environmental change under the Outer Space Treaty.

5. *Weather Modification and Analogous Practice*

Weather modification may result either from a deliberate attempt to change the weather (for example, by seeding clouds or by changing storm tracks) or inadvertently from activities conducted for other purposes (for example, the "greenhouse effect" of urbanization and industrialization). The discussion below will concentrate on deliberate weather modification and on inadvertent modification only insofar as it stems from the operation of jet aircraft.

Deliberate weather modification has aroused scientific concern focusing on the possible effects beyond the immediate geographic area in which modification is desired. The problem arises because of the complex (and not wholly understood) interaction among atmospheric processes which may often preclude effective confinement of atmospheric change to the intended area.[119] The more ambitious the weather modification attempt, the less predictable and more potentially serious are the unintended effects.[120] They may range from changes in immediate precipitation to relatively long-term climatic changes.[121]

[117] See text at note 96 above. *Cf.* statement of the U.S. Secretary of State, in the text at note 145 below.

[118] The announced criterion for consultations is broader than that in the outer space treaty. It is questionable whether the United States did much more than notify other states of its intention in advance of the space needles experiment. See E. Skolnikoff, Science, Technology, and American Foreign Policy 85–87 (1967). The announced willingness to consult presumably was intended as an assurance that something more than notification could thereafter be expected in comparable circumstances, though discretion was retained to determine whether an activity may create a significant risk.

[119] For non-technical descriptions of the pertinent atmospheric properties, see G. Trewartha, An Introduction to Climate 16–35 (4th ed., 1968); Study of Critical Environmental Problems, *op. cit.* note 51 above, at 41–46.

[120] See generally H. Lamb, The Changing Climate 154–156 (1966); National Science Foundation, Weather and Climate Modification 114 (1966); Roberts, "The State of the Art in Weather Modification," in Weather Modification and the Law 1, 16 (H. Taubenfeld ed., 1968); Wexler, "Modifying Weather on a Large Scale," 128 Science 1059, 1061–1063 (1958).

[121] There is a distinction between weather modification and climate modification. The latter involves an attempt to change long-term climatic conditions. See Wycoff,

The U.S. Department of State has acknowledged the need to abstain from intentional weather modification activities that might affect the weather of other countries, in the absence of advance agreements with them.[122] The announced rationale reflects the *raison d'être* for virtually any international norm limiting freedom of state action: "We won't want other nations modifying *our* weather, and so we will certainly have to accept some restraints on our freedom to modify theirs."[123] The harmony with the rationale for the creation and observance of custom does not establish that the norm exists. But it does suggest that the United States has not been exercising restraint entirely gratuitously, and thus lends normative significance to U.S. practice.

United States practice concerning deliberate weather modification has been consistent with a norm of restraint. Standards set for hurricane seeding projects take into account the interests of Caribbean and Atlantic islands, and reflect an understanding that hurricane seeding may produce unpredictable results.[124] Less ambitious modification projects sponsored by the Government have also carefully avoided any significant effects on neighboring countries.[125] The consistent practice, in light of the express recognition of mutual self-interest, suggests that a norm of restraint either exists or is in the process of formation. At the root of the norm is the uncertainty of the consequences, balanced against the expected utility of the activity.[126]

United States practice involving the use of jet aircraft has not been quite so circumspect. Tentative results from existing studies indicate that there may be some increase in cirrus (ice crystal) clouds in heavily traveled air lanes.[127] This could be the consequence of injections of water vapor from jet exhaust in the upper troposphere, where relative humidity is such that cloud formation is likely to result from moisture increases.[128] Cirrus clouds reflect both incoming solar radiation and outgoing earth radiation. They can therefore affect climate through changes in the at-

"Evaluation of the State of the Art," in Human Dimensions of Weather Modification 27, 37 (W. Sewell ed., 1966).

[122] Department of State letter to Senator Magnuson, in Hearings on S.23 and S.2916 before the Senate Committee on Commerce, 89th Cong., 1st and 2d Sess., Pt. 2, at 321 (1965–1966). Note that the reference is to advance agreements, not simply to consultations.

[123] Cleveland, "The Politics of Outer Space," 52 Dept. of State Bulletin 1010 (1965) (emphasis in original).

[124] See Wollan, "Controlling the Potential Hazards of Government-Sponsored Technology," 36 G.W. Law Rev. 1105, 1117–1118 (1968); R. and H. Taubenfeld, *loc. cit.* note 100 above, at 811, note 7.

[125] See Hearings on S.23 and S.2916, *op. cit.* note 122 above, Pt. 1, at 237; *ibid.*, Pt. 2, at 405.

[126] *Cf.* M. McDougal and W. Burke, *op. cit.* note 27 above, at 792–793, noting the uncertain rôle of oceans in determining climate, and concluding that intentional interference with climatic conditions "would appear to be one activity which will be regarded as requiring the explicit agreement among states adversely affected." See also M. McDougal, H. Lasswell and I. Vlasic, *op. cit.* note 6 above, at 631.

[127] See Study of Critical Environmental Problems, *op. cit.* note 51 above, at 67.

[128] *Ibid.* 66.

mospheric heat balance.[129] Although nothing appears to suggest that current subsonic jet operations have yet had a significant effect on climate, scientists are concerned about future effects if there is a substantial increase in jet activity.

The United States, of course, is far from the only nation to operate commercial jet aircraft in the upper troposphere. The widespread international participation negates the existence of a general norm proscribing this commercial use of advanced technology in the *res communis* simply because it may ultimately have unintended and uncertain environmental side effects.[130]

This does not mean that all unintended environmental effects of commercial aviation have been ignored. For example, a significant step was taken by the Federal Aviation Administration in 1970 toward prohibiting sonic booms for commercial flights over the United States. This was done at a time when the United States' supersonic transport prototype production was still being funded by the Federal Government and when the prospect of supersonic operations involving United States territory and U.S. flag carriers seemed considerably more realistic than it did some months later. In the view of the F.A.A., "A restriction on sonic boom producing flights over populated areas is supported at this time by the inconclusive results of research concerning the effects of the sonic boom on the surface environment." [131] The "restriction" proposed was actually a prohibition, dictated by the uncertainty of the environmental effect of the sonic boom.[132]

Significant also is the Congressional refusal to provide further funds for SST development. The environmental motivations are not as easily isolated as in the case of measures designed to prohibit sonic booms, but it is clear that such considerations played a part and that members of the Congress were fully aware of the international environmental implications involved in going ahead. It does appear that the risk of climatic change (possibly global in scope) from sustained SST use in the stratosphere is substantially greater than from subsonic commercial operations in the troposphere.[133] This was brought out in Congressional committee hearings and was a major issue in the floor debates.[134]

[129] *Ibid.* 91–92, 99. *Cf.* 2 National Academy of Sciences-National Research Council, Weather and Climate Modification: Problems and Prospects 61 (1966); Report to the Chief, United States Weather Bureau, Weather and Climate Modification 7 (1965). An artificial increase in cirrus cloudiness might also stimulate local precipitation. See Study of Critical Environmental Problems, *op. cit.*, at 100.

[130] Compare the use of super-tankers at sea. See text at note 51 above.

[131] F. A. A. Notice of Proposed Rule Making, 35 Fed. Reg. 6189–6190 (1970).

[132] Other nations have also proposed to ban the sonic boom. See The Times (London), Sept. 15, 1970, at 1, col. 8; New York Times, Feb. 4, 1970, at 86, col. 5. If enough nations do so, a general principle relating to the boom might arise. Whether or not this occurs, the proposed U.S. restriction is particularly significant because of the rationale given for it.

[133] See Study of Critical Environmental Problems, *op. cit.* note 51 above, at 67–74, 100–107. The problem arises largely because the SST would introduce water vapor and particulate matter into the normally dry and cloudless stratosphere, where stable

Steps taken by the United States to restrict sonic booms and to halt governmental funding for the SST are domestic public acts involving internationally relevant policy. These decisions are consistent with U.S. practice in the area of intentional weather modification. They are capable of influencing expectations regarding United States use of new technology in the common environment—particularly in an environment not previously utilized extensively by man—when responsible scientific opinion is able to point out potentially severe environmental effects, even though the precise consequences are uncertain.[135]

6. *Other Treaty Practice*

The Antarctic Treaty prohibits the disposal of radioactive wastes in the Antarctic area, and foreshadowed the Nuclear Test Ban Treaty by prohibiting nuclear explosions in the area.[136] It is noteworthy that the prohibition of radioactive waste disposal and of nuclear explosions was inserted to meet the real but unverified environmental concerns of Southern Hemisphere nations.[137] A norm calling for abstention in a near-virgin environment was included in response to assertions which lacked a clear

climatic conditions would impede the relatively rapid diffusion which occurs in the troposphere. The result could be temperature changes, increased cirrus cloudiness, and climate modification. Moreover, there is concern that SST water vapor and nitric oxides would decompose some stratospheric ozone, permitting increased solar ultraviolet radiation to reach the earth. See Report to the Secretary of the Interior of the Special Study Group on Noise and Sonic Boom in Relation to Man 50–52 (1968); Harrison, "Stratospheric Ozone with Added Water Vapor: Influence of High-Altitude Aircraft," 170 Science 734 (1970); Johnston, "Reduction of Stratospheric Ozone by Nitrogen Oxide Catalysts from Supersonic Transport Exhaust," 173 *ibid.* 517 (1971); Newell, "Water Vapour Pollution in the Stratosphere by the Supersonic Transporter?", 226 Nature 70 (1970). But see 2 National Academy of Sciences-National Research Council, *op. cit.* note 129 above, at 98–100; Chatham, "Will the SST Change the Weather?", 8 Astronautics & Aeronautics at 8 (Jan. 1970).

[134] See, *e.g.*, Hearings on Economic Analysis and the Efficiency of Government before a Subcommittee of the Joint Economic Committee, 91st Cong., 2d Sess., Pt. 4, at 1000–1006 (1970); Hearings on Dept. of Transportation and Related Agencies Appropriations for 1971 before a Subcommittee of the Senate Committee on Appropriations, 91st Cong., 2d Sess., Pt. 2, at 1480–1486, 1586–1591 (1970); Senate debate, 117 Cong. Rec. S2461–62, 2636–37, 2702, 3092–97, 3504, 3629–32, 3820–57 *passim* (daily ed., March 4, 9, 12, 23, 24, 1971).

[135] *Cf.* Virally, *loc. cit.* note 24 above, at 130.

[136] Dec. 1, 1959, Art. V(1), (1961) 1 U.S.T. 794; T.I.A.S. No. 4780; 402 U.N.T.S. 71; 54 A.J.I.L. 477 (1960). The treaty does contain a caveat reserving the rights of any state under international law regarding the high seas within the Antarctic area. In view of the recognized restrictions on the right to conduct nuclear tests even before the Test Ban Treaty (see text at notes 26–27 above), the caveat would have only a limited effect on the nuclear explosion prohibition. This point is of more than academic importance, since not all parties to the Antarctic Treaty are parties to the Test Ban Treaty. *Cf.* Antarctic Treaty, Art. V(2). It is doubtful that there is a right to dispose of radioactive waste in the high seas of the Antarctic area, since other, less sensitive, disposal sites are available. *Cf.* text at notes 31–42 above.

[137] See H. Taubenfeld, "A Treaty for Antarctica" (International Conciliation No. 531), at pp. 243, 284–285 (1961).

showing of present or future environmental harm, but which evidenced a not wholly unwarranted concern on the part of interested states.

Noteworthy also is Article 25(2) of the Convention on the High Seas.[138] It provides that

> All States shall cooperate with the competent international organizations in taking measures for the prevention of pollution of the seas or air space above, resulting from any activities with radioactive materials or other harmful agents.

It has been suggested that Article 25(2) provides no more than an admonishment to co-operate.[139] But the terms are clearly those of obligation rather than of admonishment, and this seems to be the general understanding of them.[140] Even in the absence of specific measures promulgated by "competent international organizations," the Secretary General took the position that the United States' disposal of nerve gas at sea in 1970 was contrary to its duty to co-operate imposed by Article 25(2).[141]

Finally, the Convention on Fishing and Conservation of Living Resources of the High Seas imposes a duty on member states

> . . . to adopt, or to co-operate with other States in adopting, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas.[142]

This appears to have been directed primarily at the problem of overexploitation rather than pollution,[143] but the objective of conservation of resources is similar to that embodied in the other conventions on the law of the sea. Each reflects community expectations of restraint sufficient to avoid impairment of the utility of ocean resources to the community at large.

III. Synthesis

The discussion has dealt with a number of instances which provide specific precedents for the normative evaluation of future conduct. It has also emphasized principles which may be drawn from existing U.S. practice. It is important to go further in order to identify the extent to which the precedents and principles may lend order to claims and counterclaims regarding issues for which no direct or closely analogous precedent exists.

The clearest norm—and the most general—evident from U.S. practice concerns the impermissibility of undertaking new technological activities in the shared environment without regard for environmental preservation.

[138] *Loc. cit.* note 11 above.

[139] M. McDougal and W. Burke, *op. cit.* note 27 above, at 867.

[140] See Schachter and Serwer, *loc. cit.* note 5 above, at 95, 98, 104.

[141] See note 44 above; Brown, *loc. cit.* note 32 above, at 253–254. It is arguable also that Art. 25(2) obligates parties to implement the General Assembly's Declaration of Principles Governing the Sea-Bed, *loc. cit.* note 4 above, with respect to activities involving "harmful agents" on the seabed. See text at notes 75–83 above.

[142] April 29, 1958, Art. 1(2), (1966) 1 U.S.T. 138, T.I.A.S. No. 5969, 559 U.N.T.S. 285; 52 A.J.I.L. 851 (1958). See also *ibid.*, Art. 2.

[143] See I.L.C. Report, U.N. Doc. A/2934, 1955 I.L.C. Yearbook (II) 19, 28–29; 5 U.N. Conf. on the Law of the Sea 10, 98, U.N. Doc. A/CONF.13/41 (1958).

U.S. practice since the early years of nuclear weapons testing shows recognition of the need to consider environmental consequences to the *res communis* and acquiescence in the assertion of a duty to do so. This has sometimes culminated in loosely formulated treaty obligations, but even in the absence of treaty the cumulative effect has been to create the expectation that the United States will take environmental hazards into account. As the awareness of environmental danger has intensified, so have the preventive measures acknowledged by the United States to be appropriate. The result is an increasing level of international expectation regarding required precautions.

In addition, United States practice concerning space experiments, weather modification and munitions disposal at sea suggests the evolution of a duty to consult internationally before carrying out novel activities in the shared environment.[144] Moreover, the Secretary of State has declared that

> . . . perhaps it is time for the international community to begin moving toward a consensus that nations have a right to be consulted before actions are taken which could affect their environment or the international environment at large. This implies, of course, that nations contemplating such actions would be expected to consult in advance other states which could be affected.[145]

This statement is noteworthy in several respects: it uses the language of rights and obligations; it applies not just to the environment of individual states, but to the environment at large; and it contemplates a duty to consult states which merely "could" be affected. The very suggestion by a United States Secretary of State that the international community move toward consensus in requiring consultations, much of the burden of which would fall on the United States, constitutes a significant step in the direction of a new binding norm.

On the question of abstention from potentially harmful conduct, it is possible to characterize practice involving the United States in cost-benefit terms. All technological developments may be considered to involve potential marginal benefits and costs not only for the developer but for the world community. Marginal benefits and costs represent the increment beyond the total benefits and costs already imparted by existing technology. Ideally the international legal system would be able to measure the marginal benefits to the world community of any new technological development, set them off against the marginal costs (including the potential cost to the shared environment), and would give normative approval only to those projects for which the marginal benefits outweigh the costs. But marginal benefits and costs obviously would not be susceptible of precise measurement in most cases. Nor does U.S. practice suggest that any such

[144] See text at notes 96 and 122 above. The United States consulted "concerned" nations before the 1970 nerve gas disposal at sea, though it did so only 19 days before the disposal. See Brown, *loc. cit.* note 32 above, at 252. Not all states consulted were opposed to the disposal. See, *e.g.*, 18 Keesing's Contemporary Archives 24386 (Jan. 9–16, 1971).

[145] Rogers, "U.S. Foreign Policy in a Technological Age," 64 Dept. of State Bulletin 198, 200–201 (1971).

precise measurement has been attempted. U.S. practice does suggest, however, that a very rough and inexact marginal cost-benefit rule of thumb may be utilized to evaluate the legitimacy of conduct in certain cases. The rule of thumb provides a rationale for much of the U.S. practice, although its usefulness as an authoritative standard for the resolution of concrete cases for which no precedent exists is probably limited at present to relatively extreme situations.[146] Its rôle will be apparent from a brief examination of cost-benefit criteria suggested by existing practice.

The views of national decision-makers concerning the legitimacy of proposed action in the common environment by another state will take account of any perceived marginal benefits not only to the decision-maker's state, but to the world community at large. Thus, for example, assertions based on environmental doubts about the use of oil super tankers have recognized their utility to the world community and have not challenged the right to use them. The assertions have instead focused on measures to reduce the risks from their use. Similarly, there is general recognition of "spillover" technological benefits for the world community from outer space activities,[147] and non-participant states have not strongly asserted any obligation to refrain from such activities except when a particular proposal has appeared to pose a severe challenge (high marginal cost) to the space environment.

More difficult is the problem of the weight given to marginal benefits which appear to accrue primarily to the acting state. It cannot be said that the precedents permit such parochial benefits to be entirely discounted in the normative process, at least insofar as they concern national interests deemed by the acting state to be vital. Atmospheric nuclear weapon testing by states not bound by prohibitory treaty obligation has withstood normative attack so long as the perceived national security benefits from continued testing have remained substantial. Similar considerations, though not quite so overtly military in nature, surround the "space race" and inhibit the development of prohibitory norms. It is significant, however, that the United States has recognized the need for rather elaborate precautions against planetary and terrestrial contamination from space activities, and on at least one occasion, when marginal cost appeared to exceed a rather slight marginal benefit (the space mirror experiment), the United States canceled its planned action.

To say that national security considerations must be taken into account is not to say that they are determinative. Nothing in United States practice has gone that far. When the environment-endangering activity is not vital for national security, as eventually became the case for the United States and the Soviet Union regarding atmospheric testing and as is the

[146] As with cost-benefit theories in economics, much of the utility of such a formulation lies in sharpening the issues rather than in definitively resolving them. *Cf.* J. Buchanan, The Public Finances 141–142 (rev. ed., 1965).

[147] For a summary of some of the shared technological benefits, see Sloop and Adams, "The Aerospace Stimulus to Technological Advance," in 1 Space Exploration and Applications 36, U.N. Doc. A/CONF.34/2, Vol. I (1969). Other papers presented at the same conference, in *ibid.*, Vols. I and II, discuss the benefits in some detail.

case with respect to ocean dumping of obsolete munitions, any remaining national security interest is clearly not conclusive. Nevertheless, it must be conceded that the significance ascribed to the activity by the acting state must be given considerable weight if the activity has a reasonable connection with national security and does not violate other recognized international norms.

On the cost side, it is clear that proven environmental damage must be considered in assessing the legitimacy of acts involving the common environment.[148] The real question involves unproven but reasonably feared environmental damage. United States practice, after having indicated some reluctance to consider unproven damage, has now evolved into a rather clear recognition of a duty to take account of it, and even to abstain from proposed action if the damage could be serious and if available safeguards do not give substantial assurance of safety. Instances include U.S. acquiescence in Mexican protests against disposal of radioactive waste in the Gulf of Mexico; abandonment of U.S. licensing for sea disposal of radioactive wastes; announcement of the intention to abstain from further sea disposal of obsolete munitions; restraint in the field of weather modification, in the absence of agreement from countries likely to be affected; and the announced rationale for the proposed prohibition of the sonic boom over the United States. In none of these cases has actual or potential environmental damage been clearly established, though in each case reasonably held apprehensions of harm exist and have been made known to U.S. decision-makers.

Advance recognition of unproven environmental harm has been particularly evident in connection with activities proposed to be undertaken in environments newly accessible (or newly of sustained interest) to man. This has developed into loosely formulated, but nevertheless significant, treaty obligations dealing with the continental shelf, outer space and Antarctica. It may also become a treaty obligation in the case of the deep seabed. Significantly, even in the absence of such a treaty involving the seabed, community expectations have been articulated in the General Assembly's declaration of a duty to take measures for the preservation of the marine environment. It is apparent that technology users are expected to give special weight to potential environmental costs of activities which probe into unknown or inadequately understood surroundings.

Marginal cost appraisal must consider the availability of reasonable alternatives to direct use of the shared environment. Some activities, such as space explorations, cannot be conducted elsewhere. Others, such as disposal of waste, could be. Thus, expectations of abstention regarding substantial U.S. disposal of radioactive wastes at sea may exist without necessarily extending to controlled disposals by countries lacking sufficient territory for safe underground burial. It cannot confidently be said, however, that this caveat will continue to exist. Pressures for outright treaty prohibition will be great. Even in the absence of explicit treaty prohibition, the virtually complete United States acquiescence in assertions deny-

[148] See the Trail Smelter Case, *loc. cit.* note 7 above.

ing the legitimacy of sea disposal is likely to engender rising expectations of abstention applicable to smaller states.

IV. Conclusion: Utility of the Cost-Benefit Approach

Practice involving the United States has carried beyond the limiting *Trail Smelter* standard of "clear and convincing evidence" of injury. No such standard of persuasion must be met before expectations of abstention arise. It is difficult to draw from U.S. practice a precise standard, but the trend is toward reversing the burden of persuasion (*i.e.* toward requiring a showing that marginal benefits will exceed marginal costs) when novel technology is involved.[149] Clearly, this applies not only to activities directly undertaken by the state or conducted within its territory, but also to activities conducted in the shared environment by those subject to its control.

As has been indicated, however, substantive principles distilled from U.S. practice will not serve to provide unimpeachable answers to contested legitimacy of proposed action in many cases for which no direct precedent exists.[150] Nevertheless they provide a basis for rational assertion and counter-assertion when environmental interests are at stake. They may thus assist in the development of specific rules, such as that which appears to be evolving in connection with the dumping of obsolete munitions at sea, and in the negotiated settlement of disputes as new claims to use the common environment arise.[151]

No one would contend that custom, even if it were well developed, could provide an adequate basis for international regulation of technology.[152] But the necessary international institutions cannot be built in a vacuum.

[149] See the instances mentioned in the text following note 148 above, and the U.S. position regarding ocean dumping of municipal and industrial wastes, in the text at note 50 above. *Cf.* Second Annual Report of the Council on Environmental Quality 259–260 (1971). Similar perspectives seem to be developing within the O.E.C.D. See The Observer (London), Oct. 17, 1971, at 2, col. 1. But see S. H. Lay and H. J. Taubenfeld, *op. cit.* note 96 above, at 191 (*re* space activities).

[150] General standards, however, have been thought dispositive of concrete issues in extreme cases in other fields. See, *e.g.*, I. Brownlie, International Law and the Use of Force by States 111 (1963) (broad pre-1939 norm that offensive use of force was illegal).

[151] It will be instructive to see whether these principles harden into a specific norm regarding sustained use of supersonic commercial aircraft in the stratosphere. In the absence of further scientific assurances of environmental safety, the potential marginal costs (in terms of possible alteration of natural conditions, from activity in an environment heretofore relatively free from the sustained presence of man) seem clearly to outweigh the marginal benefits. See note 133 above.

[152] The inability of existing international norms to provide a cohesive regulatory system for the use of the fruits of technology lies behind such extensions of domestic jurisdiction as the Canadian Arctic Waters Pollution Prevention Act. See documents collected in 9 Int. Legal Materials 543–552, 598–615 (1970); Bilder, "The Canadian Arctic Waters Pollution Prevention Act: New Stresses on the Law of the Sea," 69 Mich. Law Rev. 1 (1970); Hardy, *loc. cit.* note 2 above, at 328–330; Macdonald, Morris and Johnston, "The Canadian Initiative To Establish a Maritime Zone for Environmental Protection: Its Significance for Multilateral Development of International Law," 21 Toronto Law J. 247 (1971).

One would hope that an identification of principles which run through the practice of such a technology-rich nation as the United States may be useful to the vital process of developing workable rules by and for the new institutions. To the extent that those who create and shape them are able to draw on a consensus of existing expectations based on the give-and-take of international affairs, the institutions stand an improved chance of success.

SELF-DETERMINATION IN INTERNATIONAL LAW

THE TRAGIC TALE OF TWO CITIES—ISLAMABAD (WEST PAKISTAN) AND DACCA (EAST PAKISTAN)*

By Ved P. Nanda **

The following inquiry into the internal conflict in East Pakistan suggests that under special circumstances a claim to self-determination, even in a non-colonial setting,[1] may be valid under international law. Although the inherent difficulty is realized in (1) defining self-determination[2] and (2) laying down the precise guidelines for a decision-maker to determine the

* This is an adapted version of a paper the author presented at a conference sponsored by The American Association for the International Commission of Jurists and the Aspen Institute for Humanistic Studies in Aspen, Colorado, on September 10, 1971. The author has greatly benefited from the comments of many conferees; however, he is especially grateful to Professors Richard Lillich, Brunson MacChesney, Myres McDougal, and Frank Newman; Niall MacDermott, Secretary General, International Commission of Jurists; John Salzberg, Executive Secretary, American Association for the I.C.J.; and Karel Vasak, Secretary General, International Institute of Human Rights, Strasbourg, for their valuable suggestions, and to Miss Britt Anderson, a second-year student at the University of Denver College of Law, for her research assistance. None of the aforementioned necessarily endose the views submitted here, for which the author assumes all responsibility.

Major events since the paper was revised in October, 1971, especially the outbreak of the Indo-Pakistan war and the subsequent establishment of an independent Bangladesh, have not so affected the initial thesis as to require any change in the substantive part of the paper. The reference to "East Pakistan" in the paper, instead of changing the name to "Bangladesh," does not show the author's preference, nor does it have any legal or political implications; it should be read merely as a matter of convenience, since the territory was called East Pakistan when the initial conflict began in March, 1971, and also at the time the paper was written. More explicitly, the reference to East Pakistan has no legal and political implications attached to this usage, for it is not indicative of the author's value judgment on the question of the statehood of Bangladesh.

** Professor of Law and Director, International Legal Studies Program, University of Denver College of Law.

[1] Colonialism as traditionally defined has been a political-economic relationship between a dominant Western nation and a subservient non-Western people. Under this definition, the relationship between East and West Pakistan is non-colonial. However, the economic and political domination of the East by West Pakistan has been a constant source of irritation to East Pakistan (see notes 51–71 below and the accompanying text), and the relationship has been described as "neo-colonial."

[2] See, generally, D. Nincic, The Problem of Sovereignty in the Charter and in the Practice of the United Nations 219–259 (1970); V. Van Dyke, Human Rights, The United States and the World Community (1970); H. Johnson, Self-Determination within the Community of Nations (1967); Panel: "Problems of Self-Determination and Political Rights in the Developing Countries," 1966 Proceedings, Am. Soc. Int. Law 129–150; R. Emerson, Self-Determination Revisited in the Era of Decolonization (Occasional Paper No. 9, Center for International Affairs, Harvard University, 1964); R. Higgins, The Development of International Law through the Political Organs of the United Nations 90–106 (1963).

"special" nature of the circumstances, nonetheless it is submitted that a contextual analysis of the East Pakistani conflict, which follows here, demonstrates that at this stage a tentative set of criteria can and should be developed to resolve the conflicting claims revolving around the principles of "territorial integrity," "self-determination," and "non-intervention." The need for such criteria is immediate, for, as the era of colonialism comes to a close, claims to self-determination in non-colonial situations are likely to increase both in number and intensity. And it may not be wise for the world community to reject all such claims to self-determination as it has done in the past. For internal conflicts whose basis is a desire for self-determination may pose a major threat in the future to international peace and security.

The discussion which follows describes those pertinent events which have a bearing upon the claim of self-determination—both those events which led to the East Pakistani crisis, and those which have occurred since the conflict began. It briefly outlines the United Nations prescriptions and practices on self-determination in a non-colonial context, and concludes with a set of recommended criteria for the application of self-determination to East Pakistan and similar non-colonial situations.

I. Islamabad Action in Dacca [3]

The conflict began on the night of March 25, 1971, when the West Pakistan Army struck Dacca without warning and, according to eyewitness accounts, killed unalerted civilians and burned homes and offices, using mortars, tanks and machine guns.[4] The following day, President Yahya Khan labeled the leader of the Awami League, Sheikh Mujibur Rahman, "an enemy of Pakistan," charged him with treasonous acts, and pronounced the League outlawed.[5] On March 27, all foreign correspondents were expelled from East Pakistan.[6] The events following the military takeover are amply documented in journalistic accounts gathered from personal observation and interviews in the refugee camps in India and from East Pakistan when correspondents were permitted back into the area.[7] Ac-

[3] The account of the events is mainly drawn from the following sources: The New York Times; The Washington Post; The Times (London); The Economist (London); Le Monde (Paris); Manchester Guardian Weekly; Statesman Weekly (Calcutta); Far Eastern Economic Review (Hong Kong); Organiser Weekly (New Delhi); and Motherland (New Delhi).

[4] See, *e.g.*, The Economist, April 13, 1971, at 29–30; New York Times, March 28, 1971, p. 1, cols. 7–8; *ibid.*, March 29, 1971, p. 1, cols. 5, 8; *ibid.*, March 30, 1971, p. 1, col. 1; p. 10, col. 4; *ibid.*, March 31, 1971, p. 1, col. 5; p. 3, col. 1; *ibid.*, April 4, 1971, p. 8, col. 1; New York Times Magazine, May 2, 1971, at 24, 94.

[5] The Economist, April 13, 1971, at 29–30; New York Times Magazine, note 4 above, at 94. On Sheikh Mujibur Rahman's trial, see, *e.g.*, reports in New York Times, Sept. 28, 1971, p. 10, col. 1; *ibid.*, Sept. 29, 1971, p. 7, col. 1.

[6] New York Times, March 28, 1971, p. 1, col. 7; p. 3, cols. 2, 4; *ibid.*, March 29, 1971, p. 1, cols. 1, 8; p. 14, col. 5.

[7] The foreign correspondents were admitted into East Pakistan in May. New York Times, May 17, 1971, p. 14, col. 4. For reported accounts, see, *e.g.*, sources cited in

counts may vary on the number of people who lost their lives, or on the nature of the resistance to the West Pakistan Army, but there is an almost unanimous consensus that the military used excessive force and repressive measures to "pacify" and "normalize" East Pakistan, resulting in a heavy loss of life, and in the damage and destruction of property. Allegations of "genocide," "selective genocide," "reign of terror," "brutal atrocities," and "flagrant violation of human rights" were repeatedly made by observers.[8] Perhaps the extent of the problem is demonstrated by the large influx of refugees from East Pakistan into India.[9]

This crisis situation was precipitated by several events. The December, 1970, general elections in Pakistan,[10] giving the League an overwhelming endorsement of its six-point election plank calling for an autonomous East Pakistan, gave concrete expression to the growing dissent in East Pakistan. The convening of the National Assembly to draft the Pakistani constitution was subsequently postponed.[11] The West Pakistani military and political leaders were afraid that the draft Constitution would reflect the League's demand for an autonomous East Pakistan because of the League majority in the Assembly. This postponement formed the initial basis for the crisis [12] which, however, was finally triggered by Rahman's non-co-operation movement and the growing demand in East Pakistan for independence.[13]

---

notes 81–86 below; Jack, "Dacca Diary," Motherland Magazine, Sept. 26, 1971, p. 1; Kann, "A Nation Divided," Wall Street Journal, July 23, 1971, p. 1, col. 1; *ibid.*, July 27, 1971, p. 1, col. 1.

[8] See, *e.g.*, notes 4, 78–86 and the accompanying text. See, however, for a report on a White Paper published by the Pakistan Government, New York Times, Aug. 6, 1971, p. 2, col. 1; Manchester Guardian Weekly, Aug. 14, 1971, p. 4, col. 4.

[9] The Times (London), Aug. 27, 1971, p. 6, col. 8, puts the figure at more than 8 million. According to official Indian sources, the number of refugees in India as of the end of September, 1971, exceeded 9 million. New York Times, Sept. 29, 1971, p. 9, col. 1; *ibid.*, Sept. 30, 1971, p. 6, col. 1; Motherland, Oct. 10, 1971, p. 1, col. 1. On the plight of the refugees, see *e.g.*, Far Eastern Economic Rev., Aug. 28, 1971, at 77–84; New York Times, Sept. 30, 1971, p. 10, col. 1; *ibid.*, Oct. 6, 1971, p. 1, col. 5; Manchester Guardian Weekly, Oct. 9, 1971, p. 14, col. 1.

[10] On the election results, see Far Eastern Economic Rev., Jan. 9, 1971, pp. 19–21; 1971 International Affairs (Moscow) (No. 3) at 73–76 (March, 1971); Naqvi, "West Pakistan's Struggle for Power," 4 South Asian Rev. (London) 213, 224–225 (April, 1971). See also Nag, "Epar Bangla; Opar Bangla—Jai Bangla, Jai Hind," Organiser, Dec. 12, 1970, at 5.

[11] The Economist, March 6, 1971, at 19–20; Far Eastern Economic Rev., March 6, 1971, p. 12; New York Times, March 23, 1971, p. 10, col. 1.

[12] For a few selected accounts of the situation before the conflict, see Naqvi, note 10 above, at 213–229; Barnds, "Pakistan's Disintegration," 27 World Today 319, 321–322 (Aug., 1971); Ahmad, "Pakistan Faces Democracy—A Provisional Nationality," 242 Round Table (London) 227, 232–237 (April, 1971); Rafferty, "Pakistan After the Flood," 3 Month (London) 84 (March, 1971).

[13] Far Eastern Economic Rev., March 6, 1971, p. 12; *ibid.*, March 20, 1971, at 5–6; New York Times, March 17, 1971, p. 17, col. 1; March 19, 1971, p. 10, col. 1; *ibid.*, March 24, 1971, p. 11, col. 1; 142 Seminar (New Delhi) 44–50 (June, 1971); Christian Science Monitor, March 26, 1971, p. 1, col. 4; New York Times Magazine, note 4 above, at 91–94. See also, F. Ahmad, East Bengal: Roots of Genocide (1971).

With the military takeover, the conflict became sensitive to outside influences. Many significant events happened, including the following: a government-in-exile of Bangladesh (the Bengali Nation) was proclaimed; [14] the Mukti Bahini (liberation army) initiated guerrilla resistance against the West Pakistani forces; [15] several Pakistani diplomats resigned in protest against the military action and defected to Bangladesh; [16] demands were placed on India to recognize the Bangladesh government; [17] the United States Congress decided to suspend economic and military aid to Pakistan until such time as it had resolved its internal conflict [18] (other governments also made similar decisions to suspend aid to Pakistan); [19] the World Bank mission to Pakistan reported on the existing military repression of Hindus and League members; [20] the U.N. Secretary General

[14] New York Times, April 14, 1971, p. 13, col. 3; *ibid.*, April 15, 1971, p. 4, col. 6; Far Eastern Economic Review, April 24, 1971, p. 5. Bangla Desh Missions were reportedly functioning in six countries. Bangla Desh (a weekly news bulletin circulated by the Bangladesh Mission, Washington, D. C.), Sept. 24, 1971, p. 3.

[15] See, *e.g.*, Banerjee, "Bangla Desh: Next Phase of the War," 6 Economic and Political Weekly (Bombay) 818 (April 17, 1971). For clashes reported in August between the guerrillas and the government troups, see, *e.g.*, Washington Post, Aug. 23, 1971, p. A 6, col. 5; New York Times, Aug. 5, 1971, p. 13, col. 3; *ibid.*, Aug. 4, 1971, p. 4, col. 4; *ibid.*, Aug. 3, 1971, p. 3, col. 6; *ibid.*, Aug. 1, 1971, §4, p. 5, col. 1; The Economist, Aug. 21, 1971, p. 34; Far Eastern Economic Review, Aug. 21, 1971, p. 7. For later clashes reported in the press, see, *e.g.*, Motherland, Sept. 26, 1971, p. 2, col. 2; p. 4, col. 6; *ibid.*, Oct. 3, 1971, p. 4, col. 6; New York Times, Oct. 6, 1971, p. 10, col. 1; *ibid.*, Oct. 10, 1971, §4, p. 2, col. 5.

[16] The Times (London), Sept. 14, 1971, p. 6, col. 7, puts the figure of such diplomats at 40.

[17] Jana Sangh, a leading opposition party in India, staged demonstrations in New Delhi demanding that the Indian Government recognize Bangla Desh. The Indian Foreign Minister had to assert in the Indian Parliament that the Indo-Soviet Treaty does not bar recognition of Bangla Desh. Statesman Weekly, Aug. 21, 1971, p. 6, col. 1. See also Guha, "Bangla Desh and Indian Self-Interest," 6 Economic and Political Weekly (Bombay) 983 (May 15, 1971); 12 Monthly Commentary on Indian Economic Conditions (New Delhi) No. 9, at 7 (April, 1971); Far Eastern Economic Rev., May 1, 1971, p. 7; Statesman Weekly, Sept. 4, 1971, p. 14, col. 1; Organiser, Sept. 25, 1971, p. 1, col. 1.

[18] For the call of the U.S. Senate Foreign Relations Committee for immediate suspension of U.S. military aid, see New York Times, May 7, p. 15, col. 1. For the House action see *ibid.*, Aug. 4, 1971, p. 1, col. 5; *ibid.*, July 16, 1971, p. 1, col. 3. See also Crisis in East Pakistan, Hearings before the Subcommittee on Asian and Pacific Affairs of the House Committee on Foreign Affairs, 92nd Cong., 1st Sess., May 11 and 25, 1971 (1971). Later, the Senate Foreign Relations Committee voted to end all aid—"military, economic, grants, loans, and sales—" to Pakistan until President Nixon "proves to Congress Pakistan is helping bring peace to the Indian subcontinent and is letting refugees return to their homes." Associated Press report in Denver Post, Oct. 15, 1971, p. 7, col. 1.

[19] See, *e.g.*, for a report on West Germany's action, Indian & Foreign Rev. (New Delhi), July 15, 1971, p. 25, and *ibid.*, July 1, 1971, p. 25, for a report on England's banning further development aid to Pakistan. See also Adam, "Yahya Aggrieved," Far Eastern Economic Rev., July 24, 1971, p. 14, for a similar report on Japan's and Canada's decision to ban further aid to Pakistan.

[20] New York Times, July 13, 1971, p. 1, col. 1; p. 8, col. 1; Far Eastern Economic Rev., July 3, 1971, p. 7; *ibid.*, Aug. 14, 1971, p. 6.

and other world leaders expressed concern over the seriousness of the situation and its possible repercussions on international peace and security; [21] the Soviet-Indian Treaty added a further dimension to such repercussions; [22] international aid was made available to the refugees,[23] and the United Nations established its presence in East Pakistan to facilitate the repatriation of refugees.[24] Although President Yahya Khan appointed a civilian governor in East Pakistan,[25] the political situation in Pakistan remained restive six months after the military takeover,[26] threatening to engulf India and Pakistan in an armed conflict.[27] Subsequently, the Indo-Pakistan war did break out in December, 1971,[28] and an independent state of Bangladesh was established with Sheikh Mujibur Rahman as its Prime Minister.[29] As of January 20, 1972, within almost a month of the end of India-Pakistan war, seven nations had recognized Bangladesh,[30] three more had decided to recognize it,[31] with several more expected to follow suit.[32]

II. The U.N. Prescriptions and Practice on Self-Determination

The U.N. Charter refers to self-determination as a principle in Articles 1(2) [33] and 55.[34] Although the Universal Declaration of Human Rights is

[21] See, *e.g.*, New York Times, Aug. 3, 1971, p. 3, col. 5 (U Thant); *ibid.*, March 28, 1971, p. 3, col. 4 (Prime Minister Gandhi); *ibid.*, April 4, 1971, p. 8, col. 1 (the Soviet President); *ibid.*, June 3, 1971, p. 9, col. 1 (Pope's appeal); *ibid.*, April 8, 1971, p. 3, col. 1 (U.S. official).

[22] New York Times, Aug. 10, 1971, p. 1, col. 6; *ibid.*, p. 28, col. 1 (editorial).

[23] See, *e.g.*, New York Times, Aug. 10, 1971, p. 1, col. 6; *ibid.*, Aug. 1, 1971, p. 2, col. 5; The Economist, June 12, 1971, at 25–26, 29; Times (London), Aug. 27, 1971, p. 6, col. 8.

[24] New York Times, June 8, 1971, p. 3, col. 3; *ibid.*, Aug. 1, 1971, § 1, p. 1, col. 1. See also Thorner, "East Pakistan: A 'Final Solution' in Bengal," *ibid.*, Aug. 19, 1971, p. 35, col. 3.

[25] Statesman Weekly (cited note 3 above), Sept. 4, 1971, p. 13, col. 3.

[26] See, *e.g.*, Washington Post, Sept. 12, 1971, p. A 18, col. 2; Simon, "Bengal Rebels Planning October Offensive," *ibid.*, Sept. 13, 1971, p. A 10, col. 1; *ibid.*, Sept. 14, 1971, p. A 18, col. 1 (editorial); Indian and Foreign Rev., Sept. 1, 1971, p. 25; New York Times, Sept. 10, 1971, p. 7, col. 1; *ibid.*, Sept. 28, 1971, p. 9, col. 1; *ibid.*, Sept. 30, 1971, p. 11, col. 1; *ibid.*, Oct. 6, 1971, p. 10, col. 1; *ibid.*, Oct. 10, 1971, §4, p. 2, col. 5.

[27] See, *e.g.*, reports in New York Times, Sept. 30, 1971, p. 11, col. 1; *ibid.*, Oct. 6, 1971, p. 1, col. 1; Denver Post, Oct. 18, 1971, p. 7, col. 1 (an Associated Press Report from New Delhi).

[28] See, *e.g.*, New York Times, Dec. 4, 1971, p. 1, col. 4; *ibid.*, Dec. 5, 1971, §1, p. 1, col. 4.

[29] On the defeat of the Pakistan Army in East Pakistan and the establishment of Bangladesh, see Organiser, Dec. 11, 1971, p. 1, col. 1; Motherland, Dec. 19, 1971, p. 1, col. 1; New York Times, Dec. 17, 1971, p. 1, col. 1; *ibid.*, Dec. 18, 1971, p. 1, col. 4; Christian Science Monitor, Dec. 17, 1971, p. 1, col. 2; Wall Street Journal, Dec. 17, 1971, p. 1, col. 1. On the takeover by Sheikh Rahman as the Prime Minister of Bangladesh, see Wall Street Journal, Jan. 13, 1972, p. 1, col. 3.

[30] New York Times, Jan. 14, 1972, p. 2, col. 3.

[31] Washington Post, Jan. 21, 1972, p. A 19, col. 1.

[32] Note 30 above; New York Times, Jan. 11, 1972, p. 11, col. 3.

[33] One of the U.N. purposes noted in Art. 1(2), is to "develop friendly relations among nations based on respect for the principles of equal rights and self-determination

silent on the subject, both of the international covenants—the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights adopted by the General Assembly in 1966—provide in identical language that:

> 1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.[35]

Six years earlier, in 1960, the Declaration on the Granting of Independence to Colonial Countries and Peoples[36] acknowledged the "right" of "all peoples" to self-determination. More recently, at its 25th Session, the General Assembly unanimously declared that all peoples have the right to determine their political, economic, social and cultural destiny without any external interference.[37] Concomitantly, it urged all states to promote the principle of "self-determination of peoples. . . ." [38]

If self-determination refers to "the freedom of a people to choose their own government and institutions and to control their own resources," [39] there seems to be a striking contradiction between the right of "all peoples" to self-determination and the right of a state to its "territorial integrity," the latter precluding secession. Commenting on this apparent conflict, Professor Rupert Emerson has recently written that "the room left for self-determination in the sense of the attainment of independent statehood is very slight, with the great current exception of decolonization." [40]

The United Nations practice supports Professor Emerson's conclusion. For instance, in the recent Nigerian conflict, only five states recognized the Biafran claim to independence,[41] and, despite a protracted struggle lasting over two and one-half years,[42] neither the United Nations nor the Organization of African Unity (O.A.U.) spoke for Biafran self-determina-

---

of peoples, and to take other appropriate measures to strengthen universal peace. . . ."

[34] Art. 55 reads in part: "With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote . . . ."

[35] Art. 1 in both Covenants. The Covenants were adopted by General Assembly Res. 2200 A (XXI), Dec. 16, 1966. The text is contained in 4 U.N. Monthly Chronicle (No. 2) at 41–72 (Feb., 1967).

[36] General Assembly Res. 1564, 15 G.A.O.R., Supp. 16, U.N. Doc. A/4684, at 66 (1960). However, the Declaration had stressed respect for the territorial integrity and the national unity of a country by adding that: "any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations."

[37] General Assembly Res. 2625 (XXV), of Oct. 24, 1970.

[38] *Ibid.* See also General Assembly Res. 2787 (XXVI), of Dec. 6, 1971.

[39] Moore, "The Control of Foreign Intervention in Internal Conflict," 9 Va. J. Int. Law 205, 247 (1971).

[40] Emerson, "Self-Determination," 65 A.J.I.L. 459, 465 (1971).

[41] Ijalye, "Was 'Biafra' at Any Time a State in International Law?", *ibid.*, 551, 553–554 (1971).

[42] See 6 Int. Legal Materials 679 (1967) for a text of the declaration of secession of May 30, 1967. The Biafran surrender was announced on Jan. 12, 1970.

tion. It should be noted that, while the United Nations never even considered the question, the O.A.U. strongly favored a unified Nigeria. Emperor Haile Selassie of Ethiopia, one of six heads of state who were members of an O.A.U. Consultative Committee on Nigeria, asserts that the national unity of individual African states is preferable because it is believed to be an "essential ingredient for the realization of the larger and greater objective of African unity." [43] In fact, the O.A.U. Charter specifically mentions the parties' adherence to the principle of "respect for the sovereignty and territorial integrity of each state." [44]

Earlier, during the Congo crisis, the United Nations had been responsible for offering an organized opposition which prevented the Katangan claim to secession.[45] More recently, U Thant has stated that the United Nations "has never accepted and does not accept and I do not believe it will ever accept the principle of secession of a part of its Member State." [46] In similar fashion, leaders of newly independent states have consistently taken the position that the right of self-determination does not include the right of secession.[47]

Many instances could be cited where the world community has ignored claims for self-determination, such as exist in Sudan, Chad and Ethiopia; [48] Tibet, Kurdistan, and Formosa.[49] Iraq's claim to Kuwait and Morocco's to Mauritania have not been recognized either.

The reason for the United Nations' reluctance to acknowledge the right of self-determination in non-colonial situations is succinctly stated by Professor Van Dyke: ". . . the United Nations would be in an extremely difficult position if it were to interpret the right of self-determination in such a way as to invite or justify attacks on the territorial integrity of its own members." [50] Thus, following the pattern set forth by the U.N. practice, self-determination would seem to be a difficult concept to apply to the

[43] Report of the O.A.U. Consultative Mission to Nigeria, cited in Ijalye, note 41 above, at 556.

[44] Cited in Van Dyke, note 2 above, at 86–87.

[45] See, generally, L. Miller, World Order and Local Disorder 66–116 (1967).

[46] 7 U.N. Monthly Chronicle 36 (Feb., 1970).

[47] Van Dyke, note 2 above, at 87, cites Senegalese, Indonesian and Indian leaders taking this position.

[48] See, *e.g.*, "The Wars You Don't Hear About," The Economist, Aug. 7, 1971, p. 16. On the Sudanese struggle, see Gray, "The Southern Sudan," 6 J. Contemporary History (London) 108 (1971).

[49] E. Luard, Conflict and Peace in the Modern International System 103 (1968), has a table showing principal minority disputes between 1918 and 1966. See, generally, *ibid.*, at 99–104, 109–116. For the Formosan claim, see a well-articulated statement in L. Chen & H. Lasswell, Formosa, China and the United Nations 82–140 (1967). Tibet has been discussed at the U.N. without any tangible outcome. See, generally, on Tibet, Sinha, "How Chinese was China's Tibet Region?", 1 Tibetan Rev. (Calcutta) (No. 4) at 9 (April, 1968); Takla, "Taiwan and Tibet," *ibid.*, at 7; "China Still Finds Trouble in Tibet," New York Times, Sept. 5, 1971, §1, p. 5, col. 1. On the Kurdish claim, see Edmonds, "The Kurdish National Struggle in Iraq," 58 Asian Affairs (n.s., Vol. II) Pt. II, at 147 (June, 1971); *idem*, "Kurdish Nationalism," 6 J. Contemporary History (London) 87 (1971). See also Beckett, "Northern Ireland," *ibid.*, 121.

[50] Van Dyke, note 2 above, at 102.

present Pakistani situation. However, the special dimensions of this crisis demand a reappraisal of traditional applications of the concept of self-determination.

III. Special Features of the East Pakistani Conflict

A combination of the following six elements distinguishes the conflict in East Pakistan from various other non-colonial situations:

1. Physical separation of the two regions and the political domination by West Pakistan over East Pakistan;
2. The nature of the linguistic, cultural and ethnic differences between the two geographic areas of Pakistan;
3. The problem of regional disparity in economic growth which is heavily weighted in favor of West Pakistan;
4. The December, 1970, elections in Pakistan which gave the Awami League an overwhelming mandate for the autonomy of East Pakistan;
5. The brutal suppression by the West Pakistani Army of the League opposition in East Pakistan and the reported murders of political leaders and intelligentsia in East Pakistan, giving rise to accusations of "genocide" and "selective genocide";
6. The impact of an independent East Pakistan on Pakistan and the rest of the world community.

1. *Physical Separation and Political Domination*

A most significant feature of Pakistan is the physical separation of the two "wings" by a thousand miles of Indian territory further accentuating the political domination by the West Pakistanis, especially the Punjabis, over East Pakistan.[51] East Pakistanis have complained of their treatment in Pakistan as "second class citizens."[52] Their representation in central government services of Pakistan after twenty-one years of independence was "barely 15 percent," according to Rahman in his election broadcast of October 28, 1970;[53] East Pakistanis never comprised more than 10 percent of the officer corps[54] and only one East Pakistani was appointed minister over the past 15 years, holding the finance portfolio for four days.[55] In the Pakistani Army, East Pakistani representation was even less than 10 percent, and of 50 senior army officers who were promoted to the rank of major general and above since 1947, only one was from East Pakistan.[56]

[51] For a perceptive analysis, see Naqvi, "West Pakistan's Struggle for Power," 4 South Asian Rev. (London) 213 (April, 1971).

[52] Gourgey, "Bangla Desh's Leader: Shiekh Mujib," 23 Venture (London) (No. 7) at 3 (July/Aug., 1971).

[53] The text is contained in 142 Seminar (note 13 above) at 39, 40.

[54] Barnds, "Pakistan's Disintegration," 27 World Today 319, 320 (Aug., 1971).

[55] Plastrik, "Behind the Revolt in East Pakistan," 18 Dissent 321 (Aug., 1971).

[56] *Ibid.*

2. *Cultural Differences between East and West Pakistan*

Islam and hatred of India were perhaps the only unifying factors between East and West Pakistan. The partition of colonial India into present-day India and Pakistan in 1947 was based on religious animosity, which continued to cause embittered relations between the two countries, a situation not alleviated by the Kashmir conflict and the Hindu-Moslem riots. However, the binding forces of Islam and a "mutual enemy" have not been strong enough to offset other more important differences [57] based on linguistic, cultural and ethnic grounds, and the cleavage between East and West Pakistan is reportedly "acute enough to threaten the union itself." [58] The East Pakistanis, about 73 million in number, 55 percent of the total population of Pakistan, are Bengalis; they speak the Sanskrit-based Bengali language and have consistently opposed the imposition of the Persian/Arabic-based Urdu; [59] they identify more with Bengali culture and intellectual thought than with the predominantly Persian and Arabic influence from West Pakistan.[60] Consequently, Pakistan has never been a cohesive national entity.

3. *Regional Economic Disparity and Conflicting Economic Interests of East and West Pakistan*

East Pakistan's economic interests have often been at variance with those of West Pakistan. For instance, the Indo-Pakistan war in 1965, which resulted in the breaking of trade links between the two countries, has seriously limited East Pakistan's export of fish and jute, exports which were primarily dependent on Indian markets; additionally, it forced East Pakistan to import its coal and cement from China and Sweden instead of India, at three times Indian prices.[61] The East Pakistani members of the Pakistani National Assembly constantly charged the Central Government with discrimination against their unit in, first, not providing them with adequate representation in the army and national civil services, and, second, treating them unfavorably in the allocation of finances and other investments.[62]

East Pakistan was the major market, and a captive one, for West Pakistan's manufactured goods, while continuing to be the latter's supplier

[57] Sayeed, "Islam and National Integration in Pakistan," in South Asian Politics and Religion 407 (D. Smith, ed., 1966).

[58] A. Tayyeb, Pakistan: A Political Geography 180 (1966).

[59] See, *e.g.*, Evan, "The Language Problem in Multi-National States: The Case of India and Pakistan," 58 Asian Affairs (n.s., Vol. II) Pt. II, at 180, 184–185 (June, 1971); Bose, "Uncertainties of 'Bangla Desh'," Thought Weekly (New Delhi), April 3, 1971, at 10, 22.

[60] See, generally, Sayeed, note 57 above, at 412; "Bengali Culture Versus the Urdu-Punjabi," Illustrated Weekly of India, May 9, 1971, p. 23.

[61] See, generally, George, "The Cross of Bengal," Far Eastern Economic Rev., April 24, 1971, at 57–63; "Does Pakistan Exist?," The Economist, March 6, 1971, at 19–20.

[62] Jha, "Roots of Pakistani Discord," 32 Indian J. Pol. Sc. 14, 29, notes 95–96 (Jan.–March, 1971), cites National Assembly of Pakistan debates for the years 1962–1965 to make this point.

of raw materials and financial resources. The Awami League's six-point program, announced in 1966 and calling for an autonomous East Pakistan,[63] was partly a response to the asserted neo-colonial status of East Pakistan. For during the nearly two decades of independence, a net transfer of resources from East to West Pakistan was officially estimated at one billion dollars.[64] The following figures indicate the extent of economic disparity between the two regions,[65] a situation called by Rahman an "appalling record" and "an intolerable structure of injustice."[66] While during the 1950's and 1960's East Pakistan earned 65 to 70 percent of Pakistan's foreign exchange, it received "just a 30 percent return for it."[67] West Pakistan's regional income in 1970 was twenty-five percent higher than that of East Pakistan, while in 1947 it was lower;[68] West Pakistan's national income rose by 34.8 percent between 1965 and 1970, while in the East it rose by 22.1 percent, and during that period the annual growth rate of West Pakistan was six percent as compared with four percent for East Pakistan.[69] In April, 1970, Professor Anisur Rahman, Professor of Economics at the University of Islamabad, asserted that the *per capita* income of West Pakistan is 100 percent greater than that of East Pakistan.[70]

In industrial development, the disparity is even more pronounced. West Pakistan, at the time of independence in 1947, had very little manufacturing industry. By the end of a decade, almost 70 percent of Pakistan's manufacturing industry was located in the West. The annual increase of agricultural production in the West has been 5.5 percent compared with a three percent increase in the East. Almost 80 percent of Pakistan's budget and 70 percent of its development funds are spent in West Pakistan.[71]

4. *Elections in Pakistan*

The Awami League won the first general parliamentary election in Pakistan on its six-point program. The program can be briefly summarized[72] as follows:

[63] See, generally, Rashiduzzaman, "The Awami League in the Political Development of Pakistan," 10 Asian Survey 574, 583 (1970); K. Kamal, Sheikh Mujibur Rahman—Man and Politician 92–103 (1970).

[64] Attributed to Sheikh Mujibur Rahman, quoted in Gourgey, note 52 above, at 13.

[65] See, generally, Bangla Desh, supplement to 12 Monthly Commentary on Indian Economic Conditions (New Delhi) 9 (April, 1971); Nag, "Gold from Bangla Desh into West Pakistan," Illustrated Weekly of India, May 9, 1971, at 15–17; Chowdhury, "Economic Policy and Industrial Growth in Pakistan—A Review," 10 Pak. Development Rev. 264, 267–268 (1970), and authorities cited there; and note 61 above.

[66] Cited in 142 Seminar at 40 (note 13 above).

[67] Cited in Gourgey, note 52 above, at 13.

[68] Based on a survey by a Pakistani economist, quoted in Ray, "Web of Bourgeois Politics," 6 Economic & Political Weekly 1221, 1222 (June 19, 1971).

[69] *Ibid.*

[70] Rahman, "East Pakistan: The Roots of Estrangement," 3 South Asian Rev. (London) 235, 236 (1970).

[71] Note 68 above.

[72] The summary is based on the sources cited in note 63 above.

A. The Pakistan Constitution shall be federal as was enunciated in the famous Lahore Resolution of March 23, 1940[73] (which formed the basis of India's partition in 1947), according to which the Moslem majority areas of the northwestern and eastern zones of India (since 1947 West and East Pakistan, respectively) were to be grouped so as to constitute independent states with "autonomous and sovereign" constituent units; a parliamentary form of government shall be elected on the basis of adult franchise and population;

B. The federal government shall deal with only two subjects, defense and foreign affairs;

C. Two separate and freely convertible currencies shall be introduced into East and West Pakistan and, if this is not feasible, effective Constitutional provisions shall be introduced, including the establishment of a separate banking reserve for East Pakistan, to stop the flow of capital from East to West Pakistan;

D. Fiscal policy, the power of taxation and revenue collection for East Pakistan shall be vested in East Pakistan;

E. There shall be separate foreign exchange earnings for East and West Pakistan; the Constitution shall empower East Pakistan to establish trade links with foreign countries;

F. East Pakistan shall have a separate militia or para-military force.

The Awami League won 167 out of 313 National Assembly seats, which gave it an outright majority to implement its election mandate. A Bengali leader, M. A. Bhashani, called it a plebiscite for a sovereign and independent East Pakistan.[74] During March, 1971, preceding the military crackdown, the resurgence of Bengali nationalism was evident from the response in East Bengal to Yahya's postponement of the convening of the National Assembly and Rahman's call of non-co-operation: the Bengalis greeted Yahya with mass demonstrations and slogans of *"Joi Bangla"* (long live independent Bengal) and brought business to a standstill at Rahman's call.[75] On the eve of the civil war, Rahman said that the East Pakistanis wished only to be "left in peace" and to "live as free people."[76] Although he stressed that the East Pakistanis desired their own constitution, he did not rule out the possibility of a loose federation with West Pakistan in the future.[77]

5. *Excessive Use of Force by the West Pakistan Army*

The military excesses in the wake of the crackdown on the night of March 25 have been described by Justice A. S. Chowdhury, Vice Chancellor

[73] For the text, see Documents on the Foreign Relations of Pakistan: The Transfer of Power 19 (K. Hasan & Z. Hasan eds., 1966).

[74] George, "Jai Banglar, Jai," Far Eastern Economic Rev., Jan. 16, 1971, at 20–21. *Cf.* President Yahya Khan's Legal Framework Order of March 30, 1970, under which the elections were held, 142 Seminar at 37–39, note 13 above. See also Yahya Khan, "Pakistan: The Transfer of Power," Vital Speeches of the Day, No. 21, Aug. 15, 1971, at 650.

[75] See sources cited in note 13 above.

[76] Adam, "The Final Round," Far Eastern Economic Rev., March 20, 1971, p. 6.

[77] *Ibid.* See also New York Times Magazine, note 4 above, at 92–94.

of the University of Dacca and the Pakistani member of the U.N. Human Rights Commission, as "atrocities unparalleled in history." [78] Addressing the Royal Commonwealth Society of London on June 8, 1971, he said: "In East Bengal today, I feel, there is no semblance of civilization. . . . Under what authority of law did these killings take place . . . ?" [79]

John Salzberg, Representative of the International Commission of Jurists, in his statement to the U.N. Subcommission on the Prevention of Discrimination and Protection of Minorities, enumerated the following violations of human rights: "killing and torture; mistreatment of women and children; mistreatment of civilians in armed conflict; religious discrimination; arbitrary arrest and detention; arbitrary deprivation of property; suppression of the freedom of speech, the press and assembly; suppression of political rights; and suppression of the right of migration." [80] Other reports have indicated that a "coldblooded, planned" attempt at systematic and selective killing of the leaders of the Awami League, Bengali military and police officials, and intellectuals (especially university teachers, writers and students), was undertaken purportedly to deprive East Pakistan of any future leadership.[81]

Anthony Mascarenhas, correspondent of the *London Times*, and formerly Assistant Editor of *The Morning News* of Karachi, was one of the eight West Pakistani journalists invited by the Pakistan Government to fly to East Pakistan and to observe the developments. In the *Sunday Times*, he reported as follows:

> What I saw and heard with unbelieving eyes and ears during my 10 days in East Bengal in late April made it terribly clear that the killings are not the isolated acts of military commanders in the field. . . .
>
> "We are determined to cleanse East Pakistan once and for all of the threat of secession, even if it means killing off two million people and ruling the province as a colony for 30 years," I was repeatedly told by senior military and civil officers in Dacca and Comilla.
>
> The West Pakistan army in East Bengal is doing exactly that with a terrifying thoroughness. . . .
>
> I saw Hindus, hunted from village to village and door to door, shot off-hand after a cursory "short-arm inspection" showed they were uncircumcised. . . .[82]

[78] New York Times, May 30, 1971, p. 5, col. 1.

[79] Chowdhury, "A Dacca View of the Bitter Struggle in Pakistan," 15 Commonwealth (London) at 89, 91 (No. 4, August, 1971).

[80] Press release of the International Commission of Jurists, Aug. 16, 1971, at 3–4.

[81] New York Times, March 31, 1971, p. 1, col. 5; p. 3, col. 1; *ibid.*, April 3, 1971, p. 1, col. 1; p. 3, col. 1; *ibid.*, April 4, 1971, p. 8, col. 1; *ibid.*, April 7, 1971, p. 7, col. 1; New York Times Magazine, note 4 above, at 94. The New York Times correspondent, Schanberg, had several accounts. See New York Times, April 4, 1971, §4, p. 4, col. 1; *ibid.*, April 14, 1971, p. 1, col. 1; *ibid.*, April 15, 1971, p. 3, col. 1. On reports of the indiscriminate killings of innocent civilians, see, *e.g.*, *ibid.*, March 29, 1971, p. 1, col. 8; *ibid.*, March 30, 1971, p. 1, col. 1; *ibid.*, March 31, 1971, p. 1, col. 5; *ibid.*, June 13, 1971, p. 9, col. 1; Far Eastern Economic Rev., May 15, 1971, at 5–7; Indian and Foreign Rev., April 15, 1971, p. 3; The Economist, June 12, 1971, at 26; notes 82–86 below; New York Times, Jan. 3, 1972, p. 1, col. 6.

[82] Quoted in Indian and Foreign Rev., July 1, 1971, p. 23, and in press release, note 80 above, at 4–5.

A British Member of Parliament who visited Pakistan and India in July, 1971, as a member of the British Parliamentary delegation, reported that "Everywhere [in East Pakistan] we saw symptoms of a country in the grip of fear . . . . [N]ot only had the army committed wide-spread killing and violence in the March/April period, but it still continued. Murder, torture, rape and the burning of homes were still going on." [83] These conditions, he said, had caused the large influx of refugees into India.[84]

At a news conference in New Delhi, Senator Edward Kennedy is reported to have had no hesitation in describing the mass killing of unarmed civilians by the West Pakistan Army as "genocide." [85] Subsequently, at the National Press Club in Washington, Senator Kennedy recommended that Washington break diplomatic relations with Pakistan "if we are not assured that the terror campaign which is still continuing today is halted." [86]

These reports also suggest that the Pakistani Army actions in East Pakistan might have seriously violated the Nuremberg norms on crimes against humanity.[87]

6. *Impact of an Independent East Pakistan*

An independent East Pakistan has the potential to be economically viable and politically stable. It would be the second largest Islamic state in the world, in fact, larger in population than either Great Britain or West Germany. Foreign exchange earnings from jute and tea are expected to provide it with a healthy economy, although it will still need to import food products for a few years.[88] While its economic infrastructure is at present inadequate for future growth in the area, and its industrial sector is also undeveloped, it is anticipated that, under a planned scheme of industrialization, there will be a wide scope for considerable diversification of the industrial base.[89] Furthermore, the anticipated restoration of trade and transport links with India will be economically beneficial to an independent East Pakistan. The overwhelming election victory of the Awami League in the December, 1970, elections gives an indication of a stable political climate. And military strength, it is submitted, should not be the determining criterion, because a country's survival or political stability does not depend solely on its military might.[90]

[83] Prentice, "Both Sides of the Disaster," New Statesman (London), July 16, 1971, p. 68.

[84] *Ibid.*

[85] Statesman Weekly, Aug. 21, 1971, p. 11, col. 1; New York Times, Aug. 17, 1971, p. 3, col. 1.

[86] Washington Post, Aug. 27, 1971, p. A 4, col. 1.

[87] For a brief discussion of crimes against humanity in the context of the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, see Miller, 65 A.J.I.L. 476, 488–492 (1971). For a report that captured officials of the Pakistani Government might be tried by Bangladesh authorities as war criminals, see New York Times, Dec. 27, 1971, p. 1, col. 6.

[88] Bangla Desh, note 65 above, at IV.

[89] *Ibid.* at V–VII; Nag, note 65 above, at 17.

[90] Professor Nathaniel Leff offers a bold new approach in suggesting that fragmentation leading to the establishment of small states with relatively small expenditures on

East Pakistan meets all the traditional requirements for recognition as a state. But perhaps even more important, its independence would not undermine that of West Pakistan, for the latter does not depend upon the former either for its political stability or for its economic viability. Therein lies the major distinguishing feature between the East-West Pakistan relationship as contrasted with the Katanga-Congo and Biafra-Nigeria relationships, which were both characterized by the fear that the secession of a part would threaten the economic viability of the rest.

Nor is an independent East Pakistan likely to cause instability in Asia. Although, at this juncture, one could at best merely surmise the relationship between East Pakistan and India, the prospects are promising that an independent East Pakistan would be friendly toward India. Similarly, East-West Pakistan relations are likely to improve over the long run if the former were to become independent, for the existing sources of tension [91] would no longer be present.

IV. The World Community Response to the Conflict

Initially, India was the only country whose government "deplored" suppression of unarmed people with tanks.[92] Pakistan responded by charging India with undue interference in its internal affairs.[93] India countered with the argument that because of the large influx of the refugees into its own country, the situation had become India's and the world's problem as well.[94] The United States and England had, at the outbreak of the conflict, characterized it as an internal matter.[95] But reports of the continued deprivation of human rights in East Pakistan seem to have caused these states, among others, to take action which might be considered of an "interventionary" nature. For instance, the U.S. Senate Foreign Relations Committee unanimously called for the immediate suspension of U.S. military aid and arms sales to Pakistan until its internal conflict was resolved.[96] Subsequently, the U.S. House of Representatives adopted a resolution suspending military and economic aid to Pakistan until the President determined that Pakistan had restored "reasonable stability" in East Pakistan and had allowed refugees to return to their homes and reclaim their property.[97]

In England the British Foreign Secretary, Douglas-Home, urged political settlement in East Pakistan in an emergency meeting of the House of Com-

armaments may even be conducive to world order. See Leff, "Bengal, Biafra & the Bigness Bias," 3 Foreign Policy 129 (Summer, 1971).

[91] See, generally, sources cited in notes 51–71 above.

[92] New York Times, March 28, 1971, p. 3, col. 4. For the latest charges made by India's Foreign Minister in the U.N. General Assembly that the Pakistani Government had unleashed a "reign of terror" in East Pakistan and that, by its actions in East Pakistan, it had violated the U.N. Charter, see *ibid.*, Sept. 28, 1971, p. 1, col. 5.

[93] See *ibid.*, March 28, 1971, p. 3, col. 5; *ibid.*, Sept. 28, 1971, p. 1, col. 5.

[94] See Prime Minister Gandhi's statement in the Indian Parliament on May 24, contained in Indian and Foreign Rev., June 1, 1971, at 4, 5. For a later statement, see Motherland, Oct. 3, 1971, p. 2, col. 2.

[95] See New York Times, April 3, 1971, p. 3, col. 1; *ibid.*, April 7, 1971, p. 3, col. 4.

[96] See *ibid.*, May 7, 1971, p. 15, col. 1. [97] See *ibid.*, Aug. 4, 1971, p. 1, col. 5.

mons.[98] The report of the World Bank mission was instrumental in the decision of the Aid-to-Pakistan consortium against renewing any further aid program to Pakistan until the internal conflict was resolved.[99]

In a Memorandum to the President of the Security Council, dated July 20, 1971, U Thant alleged that the conflict in East Pakistan had demonstrated that mere relief programs and other humanitarian efforts by a commiserating international community were simply not sufficient to alleviate human misery and avert potential disaster. He expressed deep concern about the consequences of the present Pakistani conflict not only for humanitarian reasons, "but also as a potential threat to peace and security. . . ." [100]

Despite U Thant's warning, the Security Council took no action then, purportedly because of the fear of further inflaming the situation.[101] However, at a meeting of the U.N. Economic and Social Council (ECOSOC), charges of violations of human rights were brought against Pakistan; [102] twenty-two non-governmental organizations in consultative status with ECOSOC sent a statement to the Secretary General calling upon the Sub-Commission on Prevention of Discrimination and Protection of Minorities, of the U.N. Commission on Human Rights, to express deep concern regarding the alleged violations of human rights and to examine all available information concerning the alleged violations.[103] Furthermore, it was recommended that the Commission on Human Rights take measures to protect the fundamental freedoms of the East Pakistanis and that a special committee be appointed under Economic and Social Council Resolution 1503 (XLVIII) to review the situation.[104] Subsequently, John Salzberg, representative of the International Commission of Jurists, addressed the session of the Sub-Commission, seeking action.[105] No further action was, however, taken.[106]

At a meeting of the International Commission of Jurists, held in September, 1971, a resolution was adopted urging "the creation of an international commission to investigate violations of human rights in the Pakistan conflict." [107] At the recent General Assembly session, while there

[98] See *ibid.*, June 10, 1971, p. 15, col. 4. [99] See sources cited in note 20 above.

[100] The text is contained in Indian and Foreign Rev., Aug. 15, 1971, at 4.

[101] For the statement by the President of the Security Council, see New York Times, Aug. 3, 1971, p. 3, col. 6.

[102] Excerpts are contained in Indian and Foreign Rev., June 1, 1971, p. 3.

[103] U.N. Doc. E/CN. 4/Sub. 2/NGO. 46, July 23, 1971.

[104] *Ibid.*

[105] Press Release of the International Commission of Jurists, Aug. 16, 1971.

[106] Unpublished report by Mr. Salzberg to the Ad Hoc Committee on Human Rights on the Consideration of the Situation in East Pakistan by the Sub-Commission on the Prevention of Discrimination and Protection of Minorities at Its Twenty-Fourth Session, Sept. 4, 1971. See also Salzberg's letter to the New York Times on the U.N. inaction, New York Times, Sept. 20, 1971, p. 24, col. 3; Homer, "Repercussions from East Pakistan," 11 War/Peace Report, at 17 (No. 8, Oct., 1971). But see John Carey's letter in response to Salzberg's letter, New York Times, Oct. 6, 1971, p. 44, col. 3.

[107] Associated Press News in Denver Post, Sept. 15, 1971, p. 36, col. 2. See also a UPI News release in Rocky Mountain News, Sept. 11, 1971, p. 10, col. 1. The conference, in its "final document," called upon the International Commission of Jurists, "as a

was no formal move for inscription of the Bangla Desh question as an agenda item for discussion until the Indo-Pakistan war, charges and countercharges by Indian and Pakistani delegates were occasionally exchanged on the subject.[108] It may be noted that the Security Council and the General Assembly discussed the situation only after a full-scale war between India and Pakistan had started.[109] Since the establishment of an independent Bangladesh,[110] several states have accorded it diplomatic recognition, the number having reached 47 at the end of February, 1972.[111]

V. Appraisal and Recommendations

Since East Pakistan approaches the parameters of a colonial situation, a case can perhaps be made for the application of self-determination on that basis. However, even if it were to be considered a non-colonial situation, the preceding discussion suggests factors which make self-determination applicable to East Pakistan. First in importance is a thousand miles of physical separation between East and West Pakistan. It should be noted that in none of the prior claims for self-determination in a non-colonial context (such as Biafra and Katanga), were the "parts" physically separated. Second is the deprivation of human rights to a *majority* of Pakistanis. The use of excessive force in any form to stifle dissent is condemnable. The use of "genocide" or "selective genocide" is even more reprehensible. Furthermore, special circumstances make self-determination an applicable principle in the present context. These circumstances include: (1) ethnic, linguistic and cultural differences; (2) the economic exploitation of East Pakistan by West Pakistan; and (3) the fact that there has been a majority determination by vote of the political direction of Pakistan, which has been forcibly denied.

These factors, it is suggested, form the basic criteria on which a decision can be made to place the demands of self-determination above those of "territorial integrity" and of a "non-interventionist" stand on the part of the United Nations. For where violence is perpetrated by a minority to deprive a *majority* of political, economic, social and cultural rights, the principles of "territorial integrity" and "non-intervention" should not be permitted to be used as a ploy to perpetuate the political subjugation of the majority.

---

matter of immediate and special urgency, to institute an inquiry into alleged violations of human rights, the humanitarian laws and the Rule of Law in East Pakistan." Final Document of the Aspen Conference (Sept. 8–12, 1971), "Justice and the Individual: The Rule of Law Under Current Pressures," at 4 (unpublished doc., 1971).

[108] See, *e.g.*, reports in New York Times, Sept. 28, 1971, p. 1, col. 5; *ibid.*, Sept. 30, 1971, p. 11, col. 1; *ibid.*, Oct. 6, 1971, p. 1, col. 7; *ibid.*, Oct. 10, 1971, §4, p. 2, col. 5; Motherland, Oct. 10, 1971, p. 1, col. 1.

[109] See, *e.g.*, New York Times, Dec. 5, 1971, §1, p. 1, col. 5; *ibid.*, Dec. 7, 1971, p. 1, col. 8; *ibid.*, Dec. 8, 1971, p. 1, col. 8; *ibid.*, Dec. 9, 1971, p. 1, col. 5; General Assembly Res. 2793 (XXVI), adopted on Dec. 7, 1971; Security Council Res. 307 (1971), adopted on Dec. 21, 1971. See also U.N. Doc. S/10410 and Add. 1, Dec. 3 and 4, 1971, for the U.N. Secretary General's Report on the situation.

[110] Note 29 above.

[111] New York Times, March 3, 1972, p. 2, col. 5.

THE INTERNATIONAL COURT OF JUSTICE AND THE HUMAN RIGHTS CLAUSES OF THE CHARTER

By Egon Schwelb *

I. Introductory

The Advisory Opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), notwithstanding Security Council Resolution 276 (1970)*,[1] contains a veritable *tour d'horizon* of contemporary international law and of the law of international organizations. It ranges over provisions of the Covenant of the League of Nations and over many articles of the Charter of the United Nations. It contains guidance on the interpretation of treaties by warning against putting too much emphasis on the intentions of some of the parties and too little on the instrument which emerged from the negotiations (p. 28). It examines the general principles of international law regulating termination of a treaty relationship on account of breach and states that the rules laid down in Article 60 of the Vienna Convention on the Law of Treaties may in many respects be considered as a codification of existing customary law on the subject (pp. 46 and 47). It states that an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation (p. 31). It advises on the consequences of voluntary abstention of permanent members of the Security Council (p. 22) and on the concept of a "dispute" as distinguished from a "situation" (pp. 22 and 23).

In a statement on the powers of the General Assembly the Advisory Opinion says that it would not be correct to assume that, because the General Assembly is in principle vested with recommendatory powers, it is debarred from adopting, in specific cases within the framework of its competence, resolutions which make determinations or have operative design (p. 50). In regard to the powers of the Security Council the Advisory Opinion finds that the reference in paragraph 2 of Article 24 of the Charter to specific powers of the Council under certain chapters of the Charter does not exclude the existence of general powers to discharge the responsibilities conferred in paragraph 1 (p. 52). Article 25 by which the Members agree to accept and carry out the decisions of the Security Council is not confined to decisions in regard to enforcement action (pp. 52 and 53).

There is no doubt that the examination and analysis of these and many other views of the Court will occupy the profession of international law for a long time to come. The present article does not propose to deal

* Yale Law School (emeritus).

[1] [1971] I.C.J. Rep. 16; 66 A.J.I.L. 145 (1972).

with them. It is restricted to one particular aspect of the Advisory Opinion, the interpretation by the Court of the human rights clauses of the Charter and the Court's answer to the question whether States Members of the United Nations, by becoming parties to the Charter, have undertaken legal obligations in the matter of human rights.

Before presenting the Court's view on a controversy which is as old as the Charter, we propose to summarize the views of some publicists on it, and to survey some instances which demonstrate the practice of United Nations organs and of Member Governments relating to the authority of the Organization under the Charter to take action on human rights violations.

II. The Views of Publicists

Since 1946 scholarly opinion has been divided on the question whether the human rights provisions of the United Nations Charter impose legal obligations.

One school, of which Manley O. Hudson was a leading representative, held that "the Charter is limited to setting out a program of action for the Organization of the United Nations to pursue, in which the Members are pledged to co-operate." He strongly criticized a tendency which seemed to prevail in some quarters to undermine respect for the integrity of international instruments by torturing their meaning and distorting provisions of the Charter in order to marshal support for reforms which, however desirable in themselves, have not been effected by the Charter itself. "A frame for a picture must not be mistaken for the picture itself."[2] As a member of the International Law Commission, Hudson stated, when that Commission in 1949 considered the draft Declaration on the Rights and Duties of States, that whenever the question of respect for human rights appeared in the Charter (Articles 1 (3), 13 (1)(b), 55 (c), 62 (2) and 76 (c)) it was as an aim to be achieved. The Charter did not in any way impose on the Members of the United Nations a legal obligation to respect human rights and fundamental freedoms.[3] He voted against the draft Declaration because the provisions of its Article 6 ("Every State has the duty to treat all persons under its jurisdiction with respect for human rights and fundamental freedoms, without distinction as to race, sex, language, or religion") went beyond the Charter and the current stage of development of international law.[4]

Hans Kelsen also expressed the view that

> the Charter does not impose upon the Members a strict obligation to grant to their subjects the rights and freedoms mentioned in the Preamble or in the text of the Charter. The language used by the Charter in this respect does not allow the interpretation that the Members

[2] Manley O. Hudson, "Integrity of International Instruments," 42 A.J.I.L. 105–108 (1948).

[3] 1949 I.L.C. Yearbook 178, 25th Meeting, par. 6.

[4] *Ibid.* 179, par. 24; also Report of the International Law Commission covering its First Session, 1949, General Assembly, 4th Sess., Official Records, Supp. No. 10 (A/925), p. 7, par. 46, and 1949 I.L.C. Yearbook 287.

> are under legal obligations regarding the rights and freedoms of their subjects . . . Besides, the Charter does in no way specify the rights and freedoms to which it refers. Legal obligations of the Members in this respect can be established only by an amendment to the Charter or by a convention . . . ratified by the Members.[5]

Kelsen maintained this view as late as 1966.[6]

One of the principal representatives of the other school of thought was Hersch Lauterpacht. He admitted that the restraint exhibited by the human rights provisions of the Charter "studiously falling short of conferment of direct executive authority, [was] impressive in its consistency. This caution [was] made more conspicuous by the choice of the agencies entrusted with the implementation, such as it is, of the provisions of the Charter," *i.e.* the General Assembly and the Economic and Social Council. Lauterpacht went on to say that the conclusion that the Charter provisions on the subject are a mere declaration of principle devoid of any element of legal obligation was "no more than a facile generalisation. For the provisions of the Charter on the subject figure prominently in the statement of the Purposes of the United Nations. Members of the United Nations are under a legal obligation to act in accordance with these purposes. It is their legal duty to respect and observe fundamental human rights and freedoms." He also said:

> There is a distinct element of legal duty in the undertaking expressed in Article 56 in which "All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55". The cumulative legal result of all these pronouncements cannot be ignored. . . . Any construction of the Charter according to which Members of the United Nations are, in law, entitled to disregard—and to violate—human rights and fundamental freedoms is destructive of both the legal and the moral authority of the Charter as a whole.[7]

Philip Jessup said: "It is already the law, at least for Members of the United Nations, that respect for human dignity and fundamental human rights is obligatory. The duty is imposed by the Charter, a treaty to which they are parties." [8]

Quincy Wright expressed the view that the text itself and the history of the drafting of Article 56 of the Charter suggest an intention to differentiate between Articles 55 and 56:

> Article 55 imposes an obligation upon the United Nations as a collective entity to promote universal respect for, and observance of, human rights, while Article 56 imposes *an obligation* upon its Members to

[5] Hans Kelsen, The Law of the United Nations 29–32 (1950).

[6] *Idem*, Principles of International Law 226, 237 (2nd ed., revised and edited by Robert W. Tucker, 1966).

[7] H. Lauterpacht, International Law and Human Rights 147–149 (Stevens & Sons Ltd., 1950; reprinted by Archon Books, 1968). See also Lauterpacht's report "Human Rights, the Charter of the United Nations, and the International Bill of the Rights of Man" in Report of the 43rd Conference (Brussels) of the International Law Association, pp. 80 *et seq.* (1948).

[8] Philip C. Jessup, A Modern Law of Nations—An Introduction 91 (1948).

> take joint *or separate* action, in coöperation with the Organization for the achievement of universal respect for, and observance of, human rights. Certainly, the latter obligation requires Members to see that their organs of government respect and observe human rights in carrying out their normal functions. . . .[9]

Georges Scelle also disagreed with Hudson's view that the Charter did not impose any positive obligations in the matter of human rights. While it did not establish specific obligations or specific rights, in Article 55, for instance, certain real obligations were implied, though vaguely expressed. The Charter provision that Members of the United Nations should *promote* respect for human rights constituted an obligation, although not a very strict one.[10]

F. Blaine Sloan submitted that taking the provisions on human rights as a whole and particularly Articles 55 and 56, a definite and positive legal obligation is embodied in the Charter. An undertaking to co-operate in the promotion of human rights does not leave a state free to suppress or even to remain indifferent to those rights. A pledge to take joint and separate action for the achievement of universal respect for, and observance of, human rights and fundamental freedoms for all cannot in good faith be reduced to a mere platitude. And it is a principle of the Charter (Art. 2 (2)) that all Members shall fulfill in good faith the obligations assumed by them.[11]

Heinz Guradze agreed with those who had challenged Kelsen's view that Article 56 was a mere tautology, legally irrelevant and superfluous. Such a conclusion, he said, violates all canons of interpretation and is also incorrect. The words "to take separate action" cannot have a meaning other than that states have the obligation to effect the protection of human rights in their own legislation and administration.[12]

Jacob Robinson, the author of the first commentary on the human rights provisions of the Charter, inclined *de lege lata* towards the view that they did not impose legal obligations on States Members. But he added:

> Although the primary purpose of this commentary was to give a purely legalistic analysis of the provisions of the Charter relating to human rights and fundamental freedoms, injustice would have been done to the Charter had we considered this instrument in its static aspect only. The Charter does have dynamic provisions in it. . . .

[9] Quincy Wright, "National Courts and Human Rights—The Fujii Case," 45 A.J.I.L. 62–82 at 73 (1951) (Emphasis added). Wright's article was primarily devoted to the question whether the human rights provisions of the Charter are self-executing, which is a problem different from that whether, in international law, they impose legal obligations on the Parties to the Charter. The passage quoted in the text leaves no doubt that his answer to the latter question was in the affirmative. In the late forties and early fifties a large body of literature devoted to the question dealt with in the text appeared. In addition to those already quoted, attention is drawn to the following: Kunz, in 43 A.J.I.L. 43 (1949), the same, in 1951 Proceedings, American Society of International Law 115; Preuss in 46 A.J.I.L. 289 (1952); Hudson in 44 *ibid.* 543 (1950).

[10] Georges Scelle, 1949 I.L.C. Yearbook 169, 23rd Meeting, par. 76.

[11] F. Blaine Sloan, "Human Rights, the United Nations and International Law," 20 Nordisk Tidsskrift for International Ret, Acta scandinavica juris gentium 30–31 (1950).

[12] Heinz Guradze, Der Stand der Menschenrechte im Völkerrecht 110–111 (1956).

There are numerous latent possibilities for positive developments, and they should certainly not be neglected.[13]

III. The Practice of the United Nations and of Member States

In the actual practice of the various organs of the United Nations over the past 25 years the obstacles to taking action based on the human rights provisions of the Charter have proved to be far less formidable than the cleavage of theoretical opinions of scholars and of abstract statements by governments would lead one to assume. In the practice of the United Nations and of its Members neither the vagueness and generality of the human rights clauses of the Charter nor the domestic jurisdiction clause have prevented the United Nations from considering, investigating, and judging concrete human rights situations, provided there was a majority strong enough and wishing strongly enough to attempt to influence the particular development. The cases of action of this type are too well known to require, and too numerous to permit of, listing in the present context. The following examples may, however, be given.

In 1949 the Economic and Social Council initiated an impartial inquiry into charges concerning forced labor. In 1951 the Council, in co-operation with the International Labor Organization established an *Ad Hoc* Committee on Forced Labor which submitted a comprehensive report in 1953.[14]

In 1949, in the so-called Russian wives case, the General Assembly declared that measures taken by the U.S.S.R. which prevent the wives of citizens of other nationalities from leaving their country of origin with their husbands or in order to join them abroad are not in conformity with the Charter. The General Assembly recommended to the Government of the U.S.S.R. to withdraw the measures of this type.[15]

In 1959, in 1961 and again in 1965 the General Assembly invoked the human rights provisions of the Charter on behalf of the people of Tibet. It called for the cessation of practices which deprive the Tibetan people of their fundamental human rights and appealed to all states to use their best endeavors to this effect.[16]

The question of human rights and discrimination in South Africa has occupied the United Nations since 1946. Only some incidents of this development which appear to be of particular relevance for the constitutional question here under consideration will be mentioned on the following pages. The concern of the Organization was originally limited to the

[13] Jacob Robinson, Human Rights and Fundamental Freedoms in the Charter of the United Nations. A Commentary 105 (1946).

[14] Resolutions of the Economic and Social Council 195 (VIII) of March 7, 1949, and 350 (XII) of March 19, 1951; Report of the Ad Hoc Committee on Forced Labor, 1953, E.S.C.O.R., 16th Sess., Supp. No. 13, Doc. E/2431, and No. 36 in the Studies and Reports (New Series) of the International Labor Office, 619 pp.; General Assembly Res. 740 (VIII) of Dec. 7, 1953, E.S.C. Res. 524 (XVII) of April 27, 1954; General Assembly Res. 842 (IX) of Dec. 17, 1954.

[15] General Assembly Res. 285 (III) of 1949.

[16] General Assembly Res. 1353 (XIV) of 1959; 4723 (XVI) and 1961; and 2079 (XX) of 1965.

question of the treatment of Indians (or people of Indian and Pakistani origin) in South Africa.[17] Its scope was extended to cover the whole question of race conflict resulting from the policies of *apartheid* in 1952.[18] In 1953 the General Assembly found that the racial policies of the Government of South Africa and their consequences are contrary to the Charter,[19] a finding that was to be repeated on later occasions with increasing emphasis.[20] In 1962 the General Assembly established a permanent organ, the Special Committee on the policies of *apartheid* of the Government of South Africa with the mandate to keep the racial policies of South Africa under review when the Assembly is not in session.[21]

The Security Council was seized of the question of the racial situation in South Africa for the first time in March/April, 1960, when it called upon South Africa to abandon its policies of *apartheid* and racial discrimination and requested the Secretary General, in consultation with the Government of South Africa, to make such arrangements as would adequately help in upholding the purposes and principles of the Charter.[22] On August 7, 1963, the Security Council again strongly deprecated the perpetuation of racial discrimination as being inconsistent with the principles of the Char-

[17] General Assembly Res. 44 (I) of 1946; 265 (III) of 1949; 395 (V) of 1950; 511 (VI) of 1952. See also Res. 615 (VII) of 1952; 719 (VIII) of 1953; 816 (IX) of 1954; 819 (X) of 1955; 1015 (XI) of 1957; 1179 (XII) of 1957; 1302 (XIII) of 1958; 1460 (XIV) of 1959; 1597 (XV) of 1961; and 1662 (XVI) of 1961.

[18] General Assembly Res. 616 (VII) of 1952. See also Res. 721 (VIII) of 1953; 820 (IX) of 1954; and 917 (X) of 1955. For the reports of the Commission established by Res. 616 (VII) see G.A.O.R., 8th Sess. a.i. 21, Supp. No. 16, Doc. A/2505 (1953); *ibid.*, 9th Sess. a.i. 23, Supp. No. 16, Doc. A/2719 (1954); *ibid.*, 10th Sess. a.i. 23, Supp. No. 14 (A/2953) (1955).

[19] General Assembly Res. 721 (VIII) of 1953.

[20] See the resolutions listed in note 18 above and further: General Assembly Res. 1016 (XI) of 1957; 1178 (XII) of 1957; 1248 (XIII) of 1958; 1375 (XIV) of 1959; 1598 (XV) of 1961 (. . . the racial policies . . . are a flagrant violation of the Charter . . . and are inconsistent with the obligations of a Member State); 1663 (XVI) of 1961 (calls the attention of the Security Council to the provision of Art. 11 (3) . . . a flagrant violation of the Charter . . . totally inconsistent with South Africa's obligations as a Member State . . . reminds the Government of South Africa of the requirement of Article 2 (2), that all Members shall fulfill in good faith the obligations assumed by them under the Charter).

[21] General Assembly Res. 1761 (XVII) of 1962; the committee established by this resolution was later renamed "Special Committee on Apartheid," decision of Dec. 8, 1970, 1921st meeting, resolutions adopted by the General Assembly during its 25th Session, G.A.O.R., 25th Sess. (1970), Supp. No. 28 (A/8028), p. 37. For further action by the General Assembly, see Res. 1881 (XVIII) of 1963; 2054 (XX) of 1965 (draws the attention of the Security Council to the fact that action under Ch. VII is essential); 2202 (XXI) of 1966; 2308 (XXII) of 1967; 2396 (XXIII) of 1968; 2506 (XXIV) of 1969; 2624, 2627, and 2671 (XXV) of 1970 (condemnation of the policies of apartheid as a crime against humanity; a crime against the conscience and dignity of mankind; repeated appeals to the Security Council to apply Ch. VII; recommendations of various forms of sanction against South Africa); 2764 (XXVI) of 1971.

[22] Res. 134 (1960), Doc. S/4300. For the reports of the Secretary General on this assignment, see Annual Report of the Secretary General on the Work of the Organization 1959/1960, G.A.O.R., 15th Sess., Supp. No. 1 (A/4390), item 13; *idem*, 1960/1961, G.A.O.R., 16th Sess., Supp. No. 1 (A/4800), item 18.

ter and contrary to South Africa's obligations as a Member State. It also called upon all states to cease forthwith the sale and shipment of arms, ammunition and military vehicles to South Africa.[23] On December 4, 1963, the Security Council requested the Secretary General to establish under his direction a group of recognized experts to examine methods of resolving the present situation in South Africa through full, peaceful and orderly application of human rights and fundamental freedoms to all inhabitants, regardless of race, color and creed, and to consider what part the United Nations might play in the achievement of that end.[24] In its report the Group of Experts recommended the establishment of a national convention fully representative of all the people of South Africa to consider the views and proposals of all those participating and set a new course for the future.[25]

On June 18, 1964, the Security Council endorsed, and subscribed in particular to, the main conclusion of the Group of Experts that "all the people of South Africa should be brought into consultation and should thus be enabled to decide the future of their country at the national level."[26] Thus, in a resolution which was adopted with the abstention of France, the U.S.S.R. and Czechoslovakia, the Security Council endorsed a program for the fundamental restructuring of a Member State in order to bring its public institutions in line with the human rights provisions of the Charter.

In 1967 the Commission on Human Rights, reversing *pro tanto* its 1947 ruling that it had no power to take any action in regard to any complaints concerning human rights, established an *Ad Hoc* Working Group of Experts to investigate the charges of torture and ill-treatment of prisoners, detainees or persons in police custody in South Africa and to recommend action to be taken in concrete cases.[27] The Economic and Social Council welcomed this decision.[28] In the following year the Commission on Human Rights enlarged the mandate of the *Ad Hoc* Working Group to cover, in addition to South Africa, Namibia (South West Africa), Southern Rhodesia and the Portuguese territories in Africa.[29] On the basis of reports submitted by the *Ad Hoc* Working Group and on the recommendation of the Commission on Human Rights and of the Economic and Social Council, the General Assembly adopted at successive sessions comprehensive resolutions calling upon South Africa and the authorities of the other territories in the south of Africa to change their legislation, to release prisoners, to punish persons guilty of the ill-treatment of prisoners, to pay compensation, etc.[30] In one of these resolutions, the General Assembly

[23] Res. 181 (1963). [24] Res. 182 (1963).

[25] Security Council, 19th Year, Official Records, Supp. for April, May and June, 1964, Doc. S/5658, Annex. [26] Res. 191 (1964).

[27] Res. 2 (XXIII) of the Commission on Human Rights, Report on the 23rd Session of the Commission (1967), E.S.C.O.R., 42nd Sess., Supp. No. 6 (E/4322), par. 268.

[28] E.S.C. Res. 1236 (XLII) of 1967.

[29] Res. 2 (XXIV) of the Commission on Human Rights, Report on the 24th Session of the Commission (1968), E.S.C.O.R., 44th Sess., Supp. No. 4 (E/4475), Ch. XVIII.

[30] Resolutions of the Commission on Human Rights 5 (XXIV) of 1968; 21 (XXV) of

called upon the Government of South Africa, *inter alia*, "to disband immediately the Bureau of State Security." [31]

In 1969 the Commission on Human Rights decided to establish a special Working Group of Experts (composed of members of the *Ad Hoc* Working Group of Experts with terms of reference for the south of Africa established in 1967) with the mandate to investigate allegations concerning Israel's violations of the Geneva Convention of 1949 relative to the Protection of Civilian Persons in Time of War in the territories occupied by Israel as a result of hostilities in the Middle East.[32] This decision was independent of, and additional to, the establishment by the General Assembly in 1968 of a Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories.[33]

The examples so far given are those of action taken by United Nations organs in regard to concrete situations in particular countries or territories. In addition, permanent procedures for the investigation of human rights problems have been instituted. One, in a specific field, freedom of association for trade union purposes, was established by the International Labor Organization on its own behalf and on behalf of the United Nations in 1949–1951. The organs charged with this task are the Fact Finding and Conciliation Commission on Freedom of Association and the Freedom of Association Committee of the Governing Body of the I.L.O. Their creation and activities are not based on a specific international treaty, but on the agreement between the International Labor Organization and the United Nations, and thus on the inherent powers of the two Organizations under their respective constitutive instruments.[34]

The other procedure, for which preparations were completed only in August, 1971, is of a general character. It is applicable to allegations which appear to reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms within the terms of reference of the Sub-Commission on Prevention of Discrimination and

---

969; 8 (XXVI) of 1970; and 7 (XXVII) of 1971; E.S.C. Res. 1333 (XLIV) of 1968; 1424 (XLVI) of 1969; 1501 (XLVIII) of 1970; General Assembly Res. 2440 (XXIII) of 1968; 2547 (XXIV) of 1969; 2714 (XXV) of 1970.

[31] General Assembly Res. 2714 (XXV) of 1970, operative par. 8 (a).

[32] Res. 6 (XXV) of the Commission on Human Rights, Report on the 25th Session of the Commission (1969), E.S.C.O.R., 46th Sess., Doc. E/4621, Ch. XVIII, item 6.

[33] General Assembly Res. 2443 (XXIII) of 1968; see also Res. 2727 (XXV) of 1970. The reports of the Special Committee are in G.A.O.R., 25th Sess. (1970) a.i. 101, Doc. A/8089, and G.A.O.R., 26th Sess. (1971) a.i. 40, Doc. A/8389.

[34] General Assembly Res. 128 (II) of 1947; Economic and Social Council Res. 52 (IV) and 84 (V) of 1947; 193 (VIII) of 1948; 239 (IX) of 1949, and 277 (X) of 1950; decisions of the Int. Labor Conference at its 30th Session in 1947 and of the Governing Body at its 110th Session (1949/1950), 111th and 113th Sessions (1950) and at its 117th Session (1951). These materials are collected in 1949 U.N. Yearbook on Human Rights 293–295 and 378–380; 1950 *ibid.* 498–499; 1951 *ibid.* 573–575. See Jenks, The International Protection of Trade Union Freedom, Ch. 8, pp. 180–200 (1957); *idem*, in The International Protection of Human Rights 221–229 (Evan Luard, ed., 1967); *idem*, in Nobel Symposium, International Protection of Human Rights 242–244 (Eide and Schou, eds., 1968); Ernst B. Haas, Human Rights and International Action, The Case of Freedom of Association (1970).

Protection of Minorities." [35] The chain of events which led to this arrangement is too involved to be capable of being summarized in the present essay. The Commission on Human Rights, set up under Article 68 of the Charter "for the promotion of human rights," was, for almost twenty years, most reluctant to become an organ actively contributing to securing effective observance of human rights. In 1947 it stated that it had no power to take any action in regard to any complaint concerning human rights [36] and was confirmed in this attitude by the Economic and Social Council.[37] Suggestions and proposals to reconsider this self-denying ordinance were made in 1949 by the Secretary General,[38] in 1952, on Egyptian initiative, by the General Assembly,[39] in 1953 again by Egypt,[40] in 1956 by Greece,[41] and in 1958 by Argentina, Belgium, Israel and the Philippines.[42] All these attempts were without avail. The break-through came in 1966–1967 on the initiative of the Committee of Twenty-Four, the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples.[43] After repeated and thorough debates in the General Assembly, Economic and Social Council, Commission on Human Rights and the Sub-Commission,[44] the Council decided in 1967 [45] that the Com-

[35] Economic and Social Council Res. 1503 (XLVIII) of May 27, 1970.

[36] E.S.C.O.R., 4th Sess., Supp. No. 3, Report of the Commission on Human Rights, First Session, Doc. E/259, par. 22.

[37] Economic and Social Council Res. 75 (V) of Aug. 5, 1947. For the history of the question of petitions or "communications" in the United Nations between the adoption of Council Res. 75 (V) of 1947 and the adoption of Council Res. 1503 (XVIII) of 1970, see John P. Humphrey in 4 Revue des droits de l'homme [Human Rights Journal] 466–475 (1971); see also John Carey, UN Protection of Civil and Political Rights, Ch. IX, pp. 84–94 and passim (1970).

[38] Report by the Secretary General on the present situation with regard to communications concerning human rights, U.N. Doc. E/CN.4/169, May 2, 1949.

[39] General Assembly Res. 542 (VI) of Feb. 4, 1952; draft resolution by Egypt, Docs. A/C.3/L.240; A/C.3/SR.417; Economic and Social Council Res. 441 (XIV) of July 23, 1952.

[40] U.N. Docs. A/C.3/L.368; A/C.3/SR.521 and 522.

[41] G.A.O.R., 11th Sess. (1956–1957) a.i. 60, U.N. Docs. A/3187 and Add. 1; A/C.3/L.592 and Rev. 1; Report of the Third Committee, Doc. A/3524.

[42] E.S.C.O.R., 26th Sess. (1958), Supp. No. 8, Report of the Commission on Human Rights, 14th Sess. (1958), Doc. E/3088, pars. 183–195, and Res. 10 (XIV); E.S.C.O.R., 28th Sess. (1959), Supp. No. 8, Report of the Commission on Human Rights, 15th Sess. (1959), Doc. E/3229, pars. 248–256, and draft resolution IV in Ch. XIV; see also Res. 728 F (XXVIII) of July 30, 1959.

[43] G.A.O.R., 20th Sess. (1965), a.i. 23, Annexes, Doc. A/6000, Rev. 1, Ch. II, par. 463.

[44] Economic and Social Council Res. 1102 (XL) of March 4, 1966; E.S.C.O.R., 41st Sess. (1966), Supp. No. 8, Report of the Commission on Human Rights, 22nd Sess. (1966), Doc. E/4184, pars. 163–222, and Res. 2 (XXII); Council Res. 1164 (XLI) of Aug. 5, 1966; General Assembly Res. 2144 A (XXI) of Oct. 26, 1965, operative par. 12; E.S.C.O.R., 42nd Sess. (1967), Supp. No. 6, Report of the Commission on Human Rights, 23rd Sess. (1967), Doc. E/4322, pars. 271–394, particularly Res. 8 (XXIII) and 9 (XXIII).

[45] Res. 1235 (XLII) of June 6, 1967; see also Res. 17 (XXV) of the Commission on Human Rights and draft resolution IX presented for adoption by the Council both in E.S.C.O.R., 46th Sess. (1969), Report of the Commission on Human Rights, 25th Sess.

mission on Human Rights may, in appropriate cases, make a thorough study of situations which reveal a consistent pattern of violations of human rights as exemplified by the policy of *apartheid* as practiced in South Africa and in Namibia and racial discrimination as practiced notably in Southern Rhodesia. The formal establishment of the new procedure took place in May, 1970, by Council Resolution 1503 (XLVIII) and provisional rules for dealing with the question of admissibility of communications were, by delegation from the Council, adopted by the Sub-Commission on Prevention of Discrimination and Protection of Minorities in its Resolution 1 (XXIV) of August 14, 1971.[46] It is not the task of the present study to enter into a description and critique of the new arrangements.

It must be sufficient to say that after the screening of allegations by a working group of the Sub-Commission, by the Sub-Commission itself and by the Commission, the new procedure may lead to investigations by an *ad hoc* committee which will be undertaken only with the express consent of the state against which the complaint is directed, and in close co-operation with that state. The *ad hoc* Committee shall report to the Commission with such observations and suggestions as it may deem appropriate and the Commission on Human Rights may decide to make recommendations to the Economic and Social Council. From the relevant decisions of the Council and the General Assembly[47] it appears that the new procedure is meant to be applicable not only in regard to dependent territories and to questions of racial discrimination, but is aimed at the stopping of violations of human rights "wherever they may occur."

IV. The View of the Court

When rendering its opinion on "the legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970)," the Court divided its reply into three parts dealing with the legal consequences of South Africa's continued presence respectively (1) for South Africa, (2) for other States Members of the United Nations, and (3) for states which are not Members of the United Nations.[48] For the purposes of the present investigation it is necessary to deal only with the first part of the Court's conclusions. In regard to the consequences for South Africa, the Court found, by 13 votes to 2, that "the continued presence of South Africa in Namibia being illegal, South Africa is under obligation to withdraw its administration from Namibia immediately and thus put an end to its occupation of the Territory."

(1969), Doc. E/4621. Summary of proceedings in pars. 407 to 435; Report of the 21st Sess. of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Doc. E/CN.4/976, particularly Res. 2 (XXI) and pars. 71–92; Council Res. 1422 (XLVI) of June 6, 1969; Res. 7 (XXVI) of the Commission on Human Rights and draft resolution V presented for adoption by the Council, both in E.S.C.O.R., 46th Sess. (1970), Supp. No. 5, Doc. E/4816. Summary of the proceedings in pars. 132–146.

[46] U.N. Doc. E/CN.4/1070.

[47] General Assembly Res. 2144 A (XXI), par. 12.

[48] [1971] I.C.J Rep. 58, par. 133.

In Resolution 2145 (XXI) of October 27, 1966, the General Assembly, "convinced that the administration of the Mandated Territory [of South West Africa] by South Africa has been conducted in a manner contrary to the Mandate, the Charter of the United Nations and the Universal Declaration of Human Rights," had *inter alia* declared "that South Africa has failed to fulfil its obligations in respect of the administration of the Mandated Territory and to ensure the moral and material well-being and security of the indigenous inhabitants of South West Africa and has, in fact, disavowed the Mandate." The General Assembly had further decided that the Mandate conferred upon South Africa "is therefore terminated" and "that South Africa has no other right to administer the Territory."

In examining this action of the General Assembly which had been alleged to be *ultra vires*, the Court found that a material breach of its obligations had been committed by South Africa, that the supervisory powers of the Council of the League of Nations had passed to the General Assembly and that the latter in terminating the Mandate had acted within the framework of its competence.

Among very many other objections against Resolution 2145 (XXI) of the General Assembly it was argued on behalf of South Africa that the consideration set forth in the resolution, "relating to the failure of South Africa to fulfil its obligations in respect of the administration of the mandated territory, called for a detailed factual investigation before the General Assembly could adopt resolution 2145 (XXI) or the Court pronounce upon its validity."[49] In its oral statement and in written communications to the Court, the Government of South Africa

> expressed the desire to supply the Court with further factual information concerning the purposes and objectives of South Africa's policy of separate development or *apartheid*, contending that to establish a breach of South Africa's substantive international obligations under the Mandate it would be necessary to prove that a particular exercise of South Africa's legislative or administrative powers was not directed in good faith towards the purpose of promoting to the utmost the well-being and progress of the inhabitants. It is claimed by the Government of South Africa that no act or omission on its part would constitute a violation of its international obligations unless it is shown that such act or omission was actuated by a motive, or directed towards a purpose other than one to promote the interests of the inhabitants of the Territory.[50]

In regard to this request made by South Africa, the Court found that

> . . . no factual evidence is needed for the purpose of determining whether the policy of *apartheid* as applied by South Africa in Namibia *is in conformity with the international obligations assumed by South Africa under the Charter of the United Nations.* In order to determine whether the laws and decrees applied by South Africa in Namibia, which are a matter of public record, *constitute a violation of the purposes and principles of the Charter of the United Nations*, the question of intent or governmental discretion is not relevant; nor is

[49] *Ibid.* 50, par. 104.

[50] *Ibid.* 56–57, par. 128.

it necessary to investigate or determine the effects of those measures upon the welfare of the inhabitants.[51]

The Court went on to say, in paragraphs 130 and 131 of the Advisory Opinion:

> 130. It is undisputed, and is amply supported by documents annexed to South Africa's written statement in these proceedings, that the official governmental policy pursued by South Africa in Namibia is to achieve a complete physical separation of races and ethnic groups in separate areas within the Territory. The application of this policy has required, as has been conceded by South Africa, restrictive measures of control officially adopted and enforced in the Territory by the coercive power of the former Mandatory. These measures establish limitations, exclusions or restrictions for the members of the indigenous population groups in respect of their participation in certain types of activities, fields of study or of training, labour or employment and also submit them to restrictions or exclusions of residence and movement in large parts of the Territory.
>
> 131. Under the Charter of the United Nations, the former Mandatory had pledged itself to observe and respect, in a territory having an international status, human rights and fundamental freedoms for all without distinction as to race. *To establish instead, and to enforce, distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter.*[52]

When the Court speaks of "conformity with the international obligations assumed . . . under the Charter," of "a violation of the purposes and principles of the Charter," of the pledge to observe and respect human rights and fundamental freedoms for all, when it finds that certain actions "constitute a denial of fundamental human rights" and classifies them as "a flagrant violation of the purposes and principles of the Charter," it leaves no doubt that, in its view, the Charter does impose on the Members of the United Nations legal obligations in the human rights field.

The Court says that the former Mandatory had pledged itself to observe and respect, *in a territory having an international status,* human rights and fundamental freedoms for all without distinction as to race. The italicized words indicate that the Court was dealing with a territory having an international status, a fact which was instrumental in the matter's having been brought before the General Assembly and the Security Council. If Namibia (South West Africa) had not been a territory having an international status, the question would not have been submitted to the Court. Moreover, the location of the acts constituting a violation of the Charter in such a territory might, the Court could be understood to say, be an aggravating circumstance, as it were. The inclusion of the words "in a territory having an international status" cannot be interpreted to mean that, in the view of the Court, to establish and to enforce distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, color, descent or national or ethnic origin which constitute a denial

[51] *Ibid.* 57, par. 129. Emphasis added. [52] *Ibid.* Emphasis added.

of fundamental human rights is *not* a flagrant violation of the purposes and principles of the Charter, if committed elsewhere than in an international territory. The pledge (Articles 55 and 56) which the Court invokes is not a pledge to promote universal respect for, and observance of, human rights and fundamental freedoms in international territories only, but "for all without distinction as to race, sex, language or religion." What is a flagrant violation of the purposes and principles of the Charter when committed in Namibia, is also such a violation when committed in South Africa proper or, for that matter, in any other sovereign Member State or in a non-self-governing or Trust Territory.

The Court speaks of a violation of the purposes and principles of the Charter. These are set forth in Chapter I of the Charter, Article 1 setting forth the purposes and Article 2 the principles. The purpose of the Organization consisting in promoting and encouraging respect for human rights and for fundamental freedoms for all is set forth in Article 1 (3). When the Court finds that South Africa's policy constitutes a flagrant violation of the purposes and principles of the Charter, it clearly does not intend to convey the idea that only Article 1 (3) has been violated. This follows from the fact that the Court refers to the pledge of Member States which is contained in Chapter IX (Article 56) of the Charter. What is meant is a violation of the relevant provisions of the Charter, *i.e.*, its human rights clauses, as a whole.[53]

As already indicated, the Court's reply that, the continued presence of South Africa in Namibia being illegal, South Africa is under obligation to withdraw its administration from Namibia and to put an end to its occupation of the Territory, was adopted by 13 votes to 2. Judge Gros, in his dissenting opinion,[54] did not express any dissent from the interpretation of the human rights provisions of the Charter contained in paragraph 131 of the Advisory Opinion quoted above. Judge Sir Gerald Fitzmaurice, in his dissenting opinion,[55] took issue with the Court's rejection of the South African application to present further factual evidence and with the justification of this rejection: that the practices of *apartheid* are self-evidently detrimental to the welfare of the inhabitants. In his opinion the deductions to be drawn from the South African laws and decrees must be at least open to argument. He held that the charges relating to conduct said to be detrimental to the material and moral well-being and social progress of the inhabitants had not been judicially determined. Sir Gerald did not comment on the Charter interpretation contained in paragraph 131 of the Advisory Opinion. Both dissenting opinions were based on considerations unconnected with the argument set forth in paragraph 131 of the Opinion, including the considerations that the United Nations was not the successor in law of the League of Nations; that the powers possessed

[53] In his Separate Opinion Judge de Castro speaks of the administration of an entrusted territory contrary to the purposes and principles of the Charter and explains this concept by adding, in brackets, Art. 1, par. 3, and Art. 76 (c). The latter is part of Chapter XII and deals with encouragement of respect for human rights as one of the basic objectives of the trusteeship system.

[54] [1971] I.C.J. Rep. 311 *et seq.* [55] *Ibid.* 208 *et seq.*

by the Council of the League of Nations had not devolved upon the General Assembly; that the function of the Council of the League of Nations did not include any power of unilateral revocation of a Mandate and no such power can have passed to the United Nations; that the Assembly's powers were limited to discussion and making recommendations and that the Security Council was not competent to regularize the Assembly's act as it has no more power to revoke the Mandate than the General Assembly.

It can therefore be said that the interpretation of the human rights clauses contained in the Advisory Opinion is backed by the authority of the Court as a body and of the thirteen Judges who voted for it and that it is not challenged by one of the two dissenting Judges and not specifically objected to by the other.

The statement in paragraphs 130 and 131 of the Advisory Opinion is not, if it is permissible to use a common law term in an international law context and in regard to an Advisory Opinion, an *obiter dictum.* It is an essential part of the *ratio decidendi.* The qualification as a flagrant violation of the purposes and principles of the Charter of the restrictive measures of control officially adopted and enforced in the Territory by the coercive power of South Africa was the justification for the Court's rejection of South Africa's desire to supply further factual information. It was the basis for the Court's decision that no factual evidence, additional to the documents annexed to South Africa's written statements, was needed for determining that the policy of separate development or *apartheid* in Namibia was not in conformity with the international obligations of South Africa. The General Assembly had terminated the Mandate because South Africa had failed to fulfil its obligations in respect of the administration of the Mandated Territory. The Court found that the Assembly's conclusion was justified because flagrant violations of the purposes and principles of the Charter had occurred. Paragraphs 130 and 131 are thus an essential link in the reasoning of the Court. In saying what is set forth in paragraphs 130 and 131, the Court did not indulge in generalities which had no actual bearing on the questions involved in the proceedings, but made a determination of an issue which was directly before it.

To sum up, it is submitted that the authority of the Court is now clearly behind the interpretation of the human rights clauses of the Charter as presented almost a generation ago by Lauterpacht and others.[56]

The Court's statement in paragraph 130 of the Advisory Opinion is of great interest also in a different respect. It speaks of establishing and enforcing "distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, color, descent or national or ethnic origin which constitute a denial of fundamental human rights." This language is to a large extent identical with and in any event very similar to that used in Article 1 of the International Convention on the Elimination of All Forms

[56] See text at notes 7 to 12 above.

of Racial Discrimination,[57] which defines the term "racial discrimination" to mean "any distinction, exclusion, restriction or preference based on race, color, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life." The latter, in its turn, is strongly influenced by the definition of discrimination as contained in the Discrimination (Employment and Occupation) Convention, 1958,[58] and the Convention against Discrimination in Education, 1960.[59] This means that the International Convention on the Elimination of Racial Discrimination is, to a large extent, declaratory of the law of the Charter, or, in other words, the basic principles of the convention lay down the law which binds also states which are not parties to the convention, but, as Members of the United Nations, are parties to the Charter.

Subsequent Action

In Resolution 301 (1971), adopted by the Security Council at its 1598th meeting on October 20, 1971, the Security Council took "note with appreciation" of the Advisory Opinion of the International Court of Justice of June 21, 1971, and stated that it "agrees with the Court's opinion expressed in paragraph 133 of the Advisory Opinion," *i.e.*, the paragraph containing the Court's conclusion. The vote on this resolution was 13 in favor, none against, and 2 abstentions (France, United Kingdom).

The General Assembly, at its 2028th plenary meeting on December 20, 1971, adopted a resolution on Namibia (Resolution 2871 (XXVI)) in the Preamble of which it notes "with satisfaction the Advisory Opinion delivered by the International Court of Justice in response to the request addressed to it by the Security Council." In an operative paragraph the General Assembly "welcomes" the Advisory Opinion "as expressed in paragraph 133 thereof." The vote on the General Assembly resolution was 111 for, 2 against (Portugal, South Africa), with 10 abstentions.

[57] Annex to General Assembly Res. 2106 A (XX), Dec. 21, 1965, reprinted in Human Rights, A Compilation of International Instruments of the United Nations, Doc. A/CONF. 32/4, U. N. Pub. Sales No.: E. 68 XIV. 6, item 8; 60 A.J.I.L. 650 (1966).

[58] Convention No. 111, adopted in 1958 by the International Labor Conference, reproduced in the Compilation A/CONF. 32/4, referred to in the preceding footnote, item 9.

[59] Adopted by the General Conference of UNESCO in 1960, reproduced in the Compilation A/CONF. 32/4, item 10.

NOTES AND COMMENTS

INSTITUT DE DROIT INTERNATIONAL: SESSION OF ZAGREB, 1971

The *Institut de Droit International* held its fifty-fifth session at Zagreb, Yugoslavia, from August 26 to September 4, 1971, under the presidency of Professor Juraj Andrassy. The attendance of some eighty members and associates included over a dozen judges or former judges of the World Court and a score of members or former members of the International Law Commission.[1] In a closely contested election, nine associates were elected titular members: Milan Bartoš, Rudolf Bindschedler, Baron van Hecke, Baron von der Heydte, Manfred Lachs, Riccardo Monaco, Paul Reuter, Mustafa Kamil Yasseen and Jaroslav Zourek. From a list of nineteen nominees, the following new associates were elected: Karl Doehring (Germany), Jens Evensen (Norway), Pierre Gannagé (Lebanon), Luis Garcia Arias (Spain), Nikolai Ushakov (U.S.S.R.), Alfred von Overbeck (Switzerland), Willis Reese (U.S.), Mario Scerni (Italy), Krysztof Skubiszewski (Poland), Ivan Tomšič (Yugoslavia), Michel Virally (France), and Louis Izaac de Winter (Netherlands).

Subsequent to the Zagreb session, the *Institut* is composed of 3 honorary members, 60 members and 63 associates, a total of 126 from 40 countries. The election of twelve new associates provided representation from only one new country—Lebanon. Although the *Institut* has consciously sought to elect new associates from countries not now included in its membership, an election depends basically upon the personal qualifications of candidates and their contributions to international law.

During its ten-day session at Zagreb, the *Institut* held twelve plenary meetings and three administrative meetings in addition to numerous meeting of various commissions. The debates led to the adoption of two resolutions on questions of public international law, the English translation of which is set forth in the Section of Official Documents of this JOURNAL.[2]

The Laws of War

For some years the *Institut* has been concerned with the applicability of the laws of war under contemporary conditions, in particular in rela-

[1] From the United States, Philip Jessup, Myres McDougal, Willis Reese, Oscar Schachter and the writer were in attendance. United States membership has declined with the resignations of Elliott Cheatham, Green Hackworth and Josef Kunz, and the death of Quincy Wright. There is a wealth of international law talent in the United States but the current tendency in the *Institut* is against electing two candidates from the same country at the same session.

[2] Below, pp. 465–470. The *Institut* also adopted two resolutions on matters of private international law which are not discussed in this note: Le contrat de commission de transport en droit international privé (Léon Babinski, Rapporteur) and Les conflits de lois en matière de droit du travail (Etienne Szászy, Rapporteur).

tion to activities of the United Nations. Realizing that it was in no position to undertake a complete revision or "restatement" of the laws of war, the *Institut* nevertheless decided in 1954 to create a commission, with Professor J. P. A. François as Rapporteur, on "Reconsideration of the Principles of the Law of War."[3] On the basis of reports submitted by Professor François,[4] the *Institut* considered the problem at its Neuchâtel session in 1959. Among the principles suggested by the Rapporteur for approval by the *Institut* was the controversial suggestion that the equality of belligerents during hostilities was a principle of the law of war which should prevail even in situations where a competent organ of the United Nations had designated an aggressor, or in military actions undertaken under the auspices of the United Nations.[5] Closely related were questions whether a revision of the rules of neutral rights and obligations might not lead to the abolition of neutrality or the substitution of permissive discrimination between belligerents for the traditional rule of impartiality of treatment. Other principles referred to the restraint or possible prohibition of massive arms of destruction, the desirability of maintaining the distinction between military and non-military objectives, and the protection of civilian populations.

Opinion was so sharply divided at the Neuchâtel session[6] that agreement was reached only to continue study of two topics: the Fourth Commission (J. P. A. François, Rapporteur) was to study further "Equality of Application of the Rules of the Law of War to Parties to an Armed Conflict"; and the Fifth Commission (Baron von der Heydte, Rapporteur), "The Distinction between Military Objectives and Non-military Objects in general and particularly the Problems associated with Weapons of Mass Destruction."

At its session in Brussels in 1963, strongly opposed views on the desirability of permitting discrimination between belligerents in the application of the laws of war where one of the belligerents was an aggressor again prevented adoption of a detailed substantive resolution. In its resolution of September 11, 1963 (which was adopted without the customary roll-call vote), the *Institut: considered* that the humanitarian rules of the law of war applied to all categories of armed conflict, including actions undertaken by the United Nations; *expressed the opinion* that there could not be complete equality in the application of non-humanitarian laws of war where a competent organ of the United Nations had determined that one of the belligerents had resorted to armed force in violation of rules of international law consecrated in the United Nations Charter; but called for further study of the conditions under which inequality

[3] *Cf.* 45 Annuaire de l'Institut de Droit International, Session d'Aix-en-Provence, 1954 (I) 555–558, Report by Frederic R. Coudert, J. P. A. François and H. Lauterpacht (Nov. 30, 1953); *ibid.* (II) 400.

[4] 47 *ibid.*, Session d'Amsterdam, 1957 (I) 323–606.

[5] *Ibid.* 328–335, 370 ff., 498–505.

[6] 48 *ibid.*, Session de Neuchâtel, 1959 (II) 178–263, 367, 389; see 54 A.J.I.L. 133, 139 (1960).

must be accepted.[7] This inconclusive result was in part attributable, according to Professor Charles Chaumont, to the ambiguity of a topic the regulation of which would involve the interpretation to be given to certain clauses of the Charter, the definition of aggression, the obligatory force of Security Council resolutions, the concept of neutrality in the frame of reference of the United Nations—matters which the *Institut* should not attempt to resolve by implication.[8]

Before pursuing the question further, the *Institut* turned its attention to Baron von der Heydte's reports on the problems posed by weapons of mass destruction and the distinction between military and non-military objectives.[9] At its Edinburgh session[10] in 1969, the *Institut* adopted a resolution, by a vote of 60–1–2, which, however worthy its objectives, probably goes beyond existing international law in proclaiming, *inter alia*:

> 6. Existing international law prohibits, irrespective of the type of weapon used, any action whatsoever designed to terrorize the civilian population.
>
> 7. Existing international law prohibits the use of all weapons which, by their nature, affect indiscriminately both military objectives and non-military objects, or both armed forces and civilian populations. . . .[11]

In 1971, at its Zagreb session, the *Institut* considered reports by Paul De Visscher on "The Conditions of the Application of the Laws of War to Military Operations of the United Nations,"[12] and, by a vote of 42–0–1, adopted a modified resolution on "The Conditions of the Application of Humanitarian Rules relating to Armed Conflict to Hostilities in which United Nations Forces may be engaged."[13] The essence of the resolution is contained in the provisions of Article 2, according to which humanitarian rules of law governing armed conflict are deemed by the *Institut* to be *ipso facto* applicable to the United Nations and any of its forces which become engaged in hostilities. In reaching this conclusion, the *Institut* rejected the view that the United Nations would have to become a party to treaties like the Geneva Conventions of August 12, 1949, or, at least, adopt a resolution providing that such humanitarian rules were applicable to military operations of United Nations forces.

As for the applicability of the so-called[14] non-humanitarian rules of the laws of war to hostilities in which United Nations forces might become

[7] 50 *ibid.*, Session de Bruxelles, 1963 (I) 5–127; *ibid.* (II) 306–356, 368, 376. See also 58 A.J.I.L. 116–117 (1964).

[8] 50 Annuaire, Session de Bruxelles (II) 345. *Cf.* François, Résumé de l' historique de la question, 51 *ibid.*, Session de Varsovie, 1965 (I) 353–356.

[9] 52 *ibid.*, Session de Nice, 1967 (II) 1–271, 527–533.

[10] 53 *ibid.*, Session d'Edimbourg, 1969 (II) 48–126, 358–360, 375–377.

[11] *Ibid.* 377. See below, p. 470.

[12] Institut de Droit International, Première Commission, Paul De Visscher, Les conditions d'application des lois de la guerre aux opérations militaires des Nations Unies, pp. 1–226 (Geneva, July 15, 1971). The reports will be published in Vol. 54 of the Annuaire.

[13] See below, p. 465.

[14] The distinction was denied by some members, who regarded all rules of the laws of war as humanitarian in purpose.

engaged, differences persisted in the *Institut* as to the equality of application of such rules to all belligerents. Proposals, *inter alia,* that where United Nations forces were engaged in military operations, no Member of the United Nations could avail itself of the general rules of the law of neutrality to derogate from its obligations under the Charter; and that Security Council resolutions could authorize Member States to refuse effect to measures of confiscation, requisition, seizure of prizes, blockade, or contraband decreed by the state resisting United Nations forces, were therefore deleted from the draft resolution and, once again, reserved for future study. After seventeen years of study, the international lawyers composing the *Institut* (and there have been many changes in membership during that period) are still in disagreement as to the conditions under which inequality of treatment of parties in hostilities in which United Nations forces are engaged is justified. Although it may be relatively easy to assume a doctrinaire position on an issue of this kind, lack of agreement on the purposes for which United Nations forces may be employed has suggested caution.

Hijacking of Aircraft

The second resolution on a question of public international law adopted by the *Institut* at Zagreb was on Hijacking of Aircraft.[15] Events had moved so rapidly in consideration of the prevention of acts endangering air travel as to threaten any meaningful contribution by the *Institut.* Although only the little-ratified Tokyo Convention of September 14, 1963, on Offenses and Certain Other Acts Committed on Board Aircraft was in force when the *Institut* commenced its study, the Hague Convention for the Suppression of Unlawful Seizure of Aircraft was opened for signature on December 16, 1970, and, the same month in which the *Institut* was in session in Zagreb, a third convention—on sabotage—was being drafted by a diplomatic conference at Montreal. The sabotage topic—like that on sanctions—could be postponed as not within the terms of reference of the *Institut* commission.[16]

On the issue of hijacking, the *Institut* wisely decided not to stress the deficiencies, the mutual contradictions and the slipshod drafting of the Tokyo and Hague Conventions,[17] but to urge their ratification by states as a first response to the problems. It believed that it could make its best contribution by emphasizing the degree to which principles which may have originated in treaty provisions or general principles had crystal-

[15] See below, p. 468, for the text. *Cf.* Institut de Droit International, Eighteenth Commission, Hijacking of Aircraft, Edward McWhinney: Provisional Report, Geneva, Oct. 1970, 151 pp.; Final Report, May, 1971, 101 pp. These reports will be published in Vol. 54 of the Annuaire.

[16] *Cf.* Art. IV of Institut resolution, below, p. 470. For the text of the Aviation Sabotage Convention adopted at Montreal, Sept. 23, 1971, see 65 Department of State Bulletin 465–468 (1971); also reprinted below, p. 455. For text of Convention on Unlawful Seizure of Aircraft, see 65 A.J.I.L 440 (1971).

[17] *Cf.* the trenchant comments of Prof. J. H. W. Verzijl in his letter of Jan. 31, 1971, to the Rapporteur, McWhinney, Final Report, cited, pp. 52–59.

lized into generally binding obligations, such as the duty of states to return hijacked planes to their commanders, to guarantee the security and human dignity of passengers and crew and permit them to continue their trip, as well as to enact the necessary legislation to accomplish these purposes and to prevent and punish hijacking.[18]

On an issue which had split the diplomatic conferences, namely, whether hijacking could be condoned when it was undertaken by refugees from political persecution or whether the obligation *aut dedere aut punire* was absolute, the *Institut* took a firm position by expressing in Article I of its resolution the opinion

> that no purpose or objective, whether political or other, can constitute justification for such unlawful acts; and that every State in whose territory the authors of such acts may be found has the right and the obligation, if it does not extradite such persons, to undertake criminal prosecution against them.

Three new commissions established by the *Institut* at its Zagreb session will study: Multinational companies; Agreements concluded between a State and Foreign Private Persons; The Protection of Diplomatic and Consular Agents.

The Centenary Session of the *Institut* will be held in Rome in 1973 under the presidency of Judge Gaetano Morelli. A special feature will be the presentation of the following reports:

The Contribution of the *Institut de Droit International* to the Development of International Law (Judge Charles De Visscher);

The Future of Public International Law under Today's Conditions (Judge Sir Gerald Fitzmaurice);

The Future of Private International Law (Professor Henri Batiffol);

The Mission of the *Institut* and its Methods of Work Today and Tomorrow (Professor Oscar Schachter).

HERBERT W. BRIGGS

THE 1971 ELECTIONS OF THE INTERNATIONAL LAW COMMISSION

The sixth general election of the members of the International Law Commission took place at the 1986th plenary meeting of the United Nations General Assembly on November 17, 1971, having been preceded by an intensive political and diplomatic campaign which in some cases had continued for the best part of a year.[1] The exaggerated politicization of these elections has been noted by the commentators.[2] The 1971 election was

[18] Art. II, below, p. 469. The Institut resolution was adopted by a vote of 53–0–3.

[1] See General Assembly, 26th Sess., Official Records, agenda Item 20. Unless otherwise stated, all the General Assembly documents referred to in this note will be found there.

[2] Herbert W. Briggs, The International Law Commission at 42 (1965); R. P. Dhokalia, The Codification of Public International Law at 166 ff. (1970); Shabtai Rosenne, "The

no exception, and its outcome must give concern to those—governments and private persons—for whom the continued successful working of the Commission and the high standards of professional competence of its members are a matter of continuing interest. That interest requires the maximum depoliticization of the process of election.

By Article 5 of the Statute of the International Law Commission the names of the candidates nominated by the governments of the Members of the United Nations shall be submitted to the Secretary General by June 1. The initial list of candidates (A/8311) contained 39 names, including 23 out of the 25 members of the Commission currently serving. Two of these were voluntarily retiring, Erik Castrén (Finland) and Fernando Albónico (Chile). With regard to the first, it was understood that the seat would be retained by a national of one of the Scandinavian states, the designation to be made through the Western European and Others group (WEO) following the consultations usual for the Nordic states. In the event, Edvard Hambro (Norway) was nominated. The second vacancy related to the floating seat (alternately held by the Latin American group and WEO), and its disposition was for some time unclear. The WEO nominee for this seat was R. Q. Quentin-Baxter (New Zealand).

Except for the East European states, which advanced three candidates (all sitting members, Milan Bartoš, Nikolai A. Ushakov and Endre Ustor, of Yugoslavia, U.S.S.R. and Hungary respectively) for their three seats, none of the other groups had at this stage a final list of candidates, a situation which was partly brought under some sort of control by the time the election took place. The period from June until the election was dominated by several sets of issues and uncertainties. These included: ignorance over the attitude of the People's Republic of China, an aspect which became more pressing after the General Assembly's decision of October 25, 1971, to seat that government; uncertainty whether the "gentleman's agreement" of 1956 as revised in 1961, on the distribution of seats, would be kept as regards the floating seat which should be transferred in 1971 from Latin America to WEO; the deep internal dissensions and rivalries within each of the Latin American, WEO and Asian groups leading to their inability to produce agreed lists of candidates with reasonable certainty that no "outsiders" would attract sufficient support to significantly affect the election results; and a number of mixed personal and political factors, such as a desire to obtain over 100 votes. The operation of most of these factors can be traced on the record.

After the General Assembly's decision on China, the Secretary General took the initiative, in a cable of November 4, in asking whether the People's Republic wished to submit nominations "more particularly of a Chinese national." On November 8 a negative reply was received.[3] It had been

International Law Commission, 1949–59," 36 Brit. Yr. Bk Int. Law 104 at 130, etc. (1960).

[3] This exchange is not included in the Official Records. See U.N. Press Section, Office of Public Information, Press Releases SG/SM/1582 and SG/SM/1588 of Nov. 4 and 9, 1971.

widely anticipated that, should the People's Republic wish to nominate a candidate, pressures to enlarge the Commission would have been released and it would have been difficult to withstand them. The negative reply enabled the election to proceed on the day fixed; in addition, it presented no new complications to the difficulties in which the Asian group found itself.

At the same time, the Secretary General's initiative, probably to be explained by the euphoria which was so characteristic of the United Nations after the China decision, cannot be passed over without criticism. Had the People's Republic wished a Chinese national to be nominated, there is no doubt that a way would have been found to do so by the statutory date. Other states had been admitted to the United Nations since the June 1 deadline. It is doubtful whether the preferred treatment accorded that government was objectively justifiable, or was compatible with the sovereign equality of Members of the United Nations, which is one of the pivots of the Charter.

Diplomatic soundings throughout the summer had indicated a strong desire on the part of the important Latin American states to honor the "gentleman's agreement" despite the widespread dissatisfaction felt in Latin America at the manner in which it was implemented. The Latin American position was ultimately placed on record in a letter of November 1, 1971, from the Permanent Representative of Costa Rica, in his capacity of Chairman of the group, to the Permanent Representative of The Netherlands in his capacity of Chairman of WEO, subsequently circulated by the Secretary General (A/8511). In that letter it was stated that the Latin American group was willing to accept that the rotating seat mentioned in the gentleman's agreement would be reserved for, and actually corresponded to WEO, which included "those States of the British Commonwealth that in 1956 were not part of any recognized regional group." Consequently the Latin American group would sponsor only four candidates to occupy the four seats traditionally allotted to it by the agreement, it being the understanding that WEO would present five candidates to occupy their four traditional seats, plus the rotating seat. The letter continued by stressing the following reservations and points of view:

> 1. The Latin American group considers the gentleman's agreement to be binding on each and every one of the regional groups only to the extent that all groups comply with its provisions and honour their observance.
>
> 2. The Latin American group considers that the gentleman's agreement of 1956, revised in 1961, has not been carried out in accordance with its original terms. Indeed, considering the three elections that have taken place since then and the election that will be held during the present session, Latin America should have been entitled to a representation of five members for two terms (one in 1956 and another in 1966). In practice, however, only once (in 1966) has Latin America been represented by five nationals. In other words, the failure to implement the agreement in its entirety has been prejudicial to Latin American interests.
>
> 3. Since the date of adoption in 1956, the General Assembly and the regional groups have undergone considerable changes in compo-

sition. In addition, the former group of British Commonwealth countries party to the agreement in 1956, and not included in any other recognized regional group, has been absorbed by the group of Western European and other States and as a result no longer exists as an autonomous regional grouping.

4. The Latin American group reiterates its conviction that the permanent members of the Security Council which are interested in having their nationals seated in the International Law Commission, as well as in other organs and commissions of the United Nations, must consider themselves as members of their respective regional groups. The Latin American group sees no reason for these seats to be allotted, of necessity, to the permanent members of the Security Council. The Latin American group views this norm of allotment of seats as appreciably affecting and distorting normal distribution, which should be affected on an equitable geographical basis.

5. In conclusion, the Latin American group wishes, as of now, to make it known that, subsequent to the elections to be held during the twenty-sixth session of the General Assembly for the 25 vacancies in the International Law Commission, it will initiate consultations with the other geographical groups to revise and update the gentleman's agreement of 1956 to make it compatible with the present membership of the Assembly, with that of its regional groups and with the views and reservations outlined above.

It was pointed out that the application of the gentleman's agreement of 1956 to the 1971 elections represented an obvious sacrifice of the interests of Latin America to the advantage of the interests of WEO. However, the Latin American group was sustained by the confidence that WEO, which had been favored by this sacrifice, would exert its best efforts in the forthcoming consultations (mentioned in paragraph 5 of the letter) to meet and satisfy legitimate Latin American aspirations for adequate representation in the Commission.

Subsequently, and after the Latin American group had finally decided to support the re-election of four of its sitting members, the other candidates withdrew: Porfirio Herrera Baez (Dominican Republic), Carlos A. Salvidar (Paraguay), Fernando Fournier-Acuña (Costa Rica), and Ulrick Noel (Haiti) (Documents A/8460, A/8514, A/8516 and A/8523). Cuba, however, was not a party to this arrangement and its candidate, Fernando Alvarez Tabio, remained. There is no doubt that this candidature had a strong impact on the final result.

WEO, on the other hand, was less adroit in reaching agreement on its favorite candidates, and it contented itself with notifying the other groups who among the candidates were sitting members and who were not. In diplomatic circles it was possible to detect signs of dissatisfaction at the lack of turnover in this group's candidates, one of whom has been a member since 1956 and another since 1961. One sitting member of this group, Constantin Eustathiades (Greece), was not re-elected, being replaced by Suat Bilge (Turkey).

The difficulties of the Asian group were twofold: the inability of the group as it is constituted to decide on its own candidates, and serious political differences as to what constituted the group. In fact the two problems co-existed. One objective of the Arab states, it was widely re-

ported, was by all means to prevent the re-election of the Israeli candidate, Shabtai Rosenne. In order to achieve this, it seems that even before the statutory deadline they had forced through an understanding in the Asian group that the group's candidates would consist of four of the sitting members, the nationals of Afghanistan, India, Iraq and Japan, plus Zenon Rossides of Cyprus. (As a curiosity, and as an illustration of the artificiality of this group construction in these elections, it will be noted that the Cypriot ultimately appeared as an Asian candidate, and the Turk as a European, and that both the Greek Cypriot Rossides and the Hellenic Greek Eustathiades obtained more than the minimum number of votes required for election, so that the possibility that the "Greek legal system" would have two representatives on the Commission could not have been excluded.) This, however, did not satisfy the Governments of Ceylon and of Thailand, both of which had nominated competent candidates (Christopher W. Pinto and Sompong Sucharitkul, respectively) who, in the view of most disinterested observers, were more qualified under the Statute than some of those elected on this ticket.

A significant illustration of the extent to which international politics entered into this facet of the election is provided by the communication of September 24, 1971, from Yugoslavia to the United Nations (A/8451) stating that Yugoslavia fully supported the candidacy of Ambassador Rossides to the said Commission. The note continued:

> Inasmuch as the Government of the Socialist Federal Republic of Yugoslavia holds the view that the nomination of non-national candidates . . . is limited to two, it was not able to nominate in due course Ambassador Rossides. The present note is, therefore, communicated in lieu of nomination.

As for the African group, apparently it was decided at the Addis Ababa meeting of the Organization of African Unity, as a way out of their internal difficulties, to support the re-election of all the five sitting members from this continent, regardless of their personal qualifications. This decision led to a series of last-minute withdrawals.[4]

The provisional summary record of the 1986th meeting of the General Assembly reports the results of the voting as follows:

Number of ballot papers:	130
Invalid ballots:	2
Number of valid ballots:	128
Abstentions:	0
Number of members voting:	128
Required majority:	65

Number of votes obtained:

Mr. Taslim Olawale Elias (Nigeria)	124
Mr. Abdullah El-Erian (Egypt)	123
Mr. Doudou Thiam (Senegal)	120

[4] The withdrawals consisted of Emmanuel K. Dadzie (of Ghana), Badouin Kalonji-Tshikala and Placide Yoko (both of Zaire) and Nkambo Mugerwa (of Uganda), U.N. Docs. A/8440, A/8512 and A/8524.

Mr. Nagendra Singh (India) 119
Mr. Nikolai A. Ushakov (Union of Soviet Socialist Republics) 119
Mr. Milan Bartoš (Yugoslavia) 118
Mr. Alfred Ramangasoavina (Madagascar) 117
Mr. Jorge Castañeda (Mexico) 116
Mr. José Maria Ruda (Argentina) 116
Mr. Endre Ustor (Hungary) 116
Mr. Mohammed Bedjaoui (Algeria) 115
Mr. Gonzalo Alcívar (Ecuador) 114
Mr. Paul Reuter (France) 112
Mr. Richard D. Kearney (United States of America) 104
Mr. Senjin Tsuruoka (Japan) 104
Mr. Mustafa Kamil Yasseen (Iraq) 104
Sir Humphrey Waldock (United Kingdom of Great Britain and Northern Ireland) 103
Mr. Roberto Ago (Italy) 101
Mr. Edvard Hambro (Norway) 101
Mr. José Sette Câmara (Brazil) 97
Mr. Arnold J. P. Tammes (Netherlands) 88
Mr. Suat Bilge (Turkey) 86
Mr. Abdul Hakim Tabibi (Afghanistan) 83
Mr. Zenon Rossides (Cyprus) 82
Mr. R. Q. Quentin-Baxter (New Zealand) 79
Mr. Constantin Th. Eustathiades (Greece) 73
Mr. Juan Manuel Castro-Rial (Spain) 72
Mr. Christopher Walter Pinto (Ceylon) 65
Mr. Fernando Alvarez Tabio (Cuba) 62
Mr. Shabtai Rosenne (Israel) 59
Mr. Sompong Sucharitkul (Thailand) 49

Accordingly, the composition of the Commission as from January 1, 1972, is as follows: Ago, Alcívar, Bartoš, Bedjaoui, Bilge, Castañeda, El-Erian, Elias, Hambro, Kearney, Quentin-Baxter, Ramangasoavina, Reuter, Rossides, Ruda, Sette Câmara, Nagendra Singh, Tabibi, Tammes, Thiam, Tsuruoka, Ushakov, Ustor, Sir Humphrey Waldock and Yasseen.

This voting is the final demonstration of the exaggerated political influence brought to bear on this election. The fact that 130 members participated in the voting, out of a total membership of 131, itself waxes eloquent (130 members had voted on October 25 on the U.S. motion for priority in the China question). Significant is the enormous gap between the highest (124) and lowest (79) number of votes received by the elected, and the order in which the various groups appear in that list. With certain obvious exceptions, the numbers of votes obtained seem to run in almost inverse order of assiduity in attendance. Thus, taking the last two (1970 and 1971) sessions of the Commission alone, at which a total of 107 public meetings were held, Abdullah El-Erian (Egypt) had been present at 54 (despite the fact that he was Special Rapporteur for the topic under discussion at most of these meetings), Doudou Thiam (Senegal) (who was elected on May 21, 1970), at 44, Ramangasoavina (Madagascar)

at 46, and Bedjaoui (Algeria), another Special Rapporteur, at 29. Yet these received from 123 to 115 votes, while Sir Humphrey Waldock, who won universal acclaim for his work as Special Rapporteur on the law of treaties, received only 103! It is also quite clear from this voting pattern that, even if the final result accords with the so-called gentleman's agreement, this is fortuitous, many votes having been cast in complete disregard of it. The 128 valid ballots allowed for 3,200 votes to be cast in all: yet the total number of valid votes on those 128 ballot papers only amounted to 3,041. The fact that 159 potential votes were thus wasted is additional indication that several voters participated with purely political aims in view. That the inter-group arrangements were not respected is also shown by the fact that, of the candidates who were not elected, no less than three, of whom two were from one group, received the required majority, while the three who did not attain that figure nevertheless polled a remarkably high number of votes, enough together to affect the final outcome.

This highly unsatisfactory feature of this election consists in the hardening, to the point of sclerosis, of the group system. This is defeating the very purpose which the General Assembly had in mind when it adopted the Statute of the Commission. For two groups—Eastern Europe and Africa—the electors were given no choice at all, and in the second case the group's choice of candidates apparently paid scant regard to the general interests in the work of the Commission. While obviously political factors cannot be entirely excluded, there is surely a general interest to keep them at their lowest point, and not to let them prevail at the cost of excluding known experience and ability from the Commission. For this reason, the non-re-election of two members of the Commission on ill-concealed political grounds, and the non-election of other qualified candidates, should not pass unnoticed.

One is tempted to recall what was said of the famous French lexicographer, Emile Littré, whose non-election and subsequent election to the Académie Française was a highly charged political matter: *"En 1863, la réputation de M. Littré était immense; il ne lui manquait plus qu'une chose pour la compléter; cette chose lui arriva: il fut refusé à l'Académie . . . ."*

MARTIN SAUNDERS

THE UNITED NATIONS AND EMERGENCY HUMANITARIAN ASSISTANCE IN INDIA-PAKISTAN

United Nations Action in East Pakistan. The quick succession of tragic events in East Pakistan has left hundreds of thousands of persons dead or injured and has generated an exodus of over nine million refugees to India culminating in full-scale warfare between India and Pakistan. To deal with the humanitarian problems, the United Nations has undertaken two separate operations, one in East Pakistan, the other in India.

In an "unusual and unprecedented form of activity for the United Nations," U Thant initiated a United Nations East Pakistan Relief Operation (UNEPRO) without any supporting resolution from any United Nations

organ. He acted because, as he put it, "I felt that my obligations under the Charter must include any humanitarian action which I could take to save the lives of large numbers of human beings." [1] The operations in East Pakistan were launched solely on the basis of President Yahya Khan's acceptance of U Thant's offer of humanitarian assistance by and through the United Nations for the relief of the distressed people of East Pakistan. President Yahya Khan gave his full support for the United Nations operation being set up in such a way as to enable the Secretary General to give contributors and donors the requisite assurances that the relief provided by and through the United Nations was reaching those for whom it was destined, the people of East Pakistan.

The agreement between the Secretary General and the Government of Pakistan was finalized by an exchange of letters on November 15 and 16, 1971, outlining the "conditions for the effective discharge of the United Nations East Pakistan Relief Operation." [2] Two days later, however, Paul-Marc Henry, in charge of UNEPRO at Headquarters, warned that "the extreme difficulties under which this operation is being carried out" were jeopardizing "the conduct of the operation, its effectiveness and perhaps even the possibility of continuing it." [3] Substantial opposition to the operation developed from the Mukti Bahini, the armed forces of the Bangladesh Government which had declared the independence of East Pakistan. The Bangladesh forces felt that UNEPRO had unwittingly been made to serve the ends of the West Pakistan "military occupation forces" and of the Razakar militia. Attacks on UNEPRO facilities and personnel led, one week after Paul-Marc Henry's warning, to the recall of some UNEPRO personnel from East Pakistan and to the apparent collapse of the operation in the wake of increasing hostilities in the Province.[4] The United States has so far contributed $93.3 million to UNEPRO.[5] The Secretary General's initiative was unanimously endorsed in Resolution 2790 (XXVI), but the activities of UNEPRO in East Pakistan had to be suspended on account of the active hostilities. Arrangements have been made for UNEPRO to be in a position to resume its humanitarian operation in the area as soon as conditions permit.

United Nations Action in India. The civil war in East Pakistan through the summer of 1971 has led to an immense tide of refugees to India. According to the Government of India this figure was 9,744,404 as of November, 1971, while the Government of Pakistan estimated that the number of persons displaced from East Pakistan was 2,002,623 on September 2, 1971. Pursuant to a request from the Indian Government for humanitarian aid, the Secretary General designated the U.N. High Commissioner for Refugees, Prince Sadruddin Aga Khan, as the focal point for the coordina-

[1] U.N. Press Release SG/1763/IHA 93, Nov. 17, 1971.

[2] The terms of this unprecedented agreement are set out in the Secretary General's Press Release, *ibid.*

[3] U.N. Press Release GA/SHC/1717/IHA/94, Nov. 19, 1971; A/C.3/SR. 1877, Nov. 18, 1971.

[4] New York Times, Nov. 25, 1971, p. 15, col. 1.

[5] See U.S. Mission to the United Nations, Press Release U.S./U.N. 193 (71), Nov. 19, 1971, for a U.S. policy statement on Humanitarian Assistance in South Asia.

tion of assistance from all the organizations and programs of the United Nations system. A general consensus now exists on the need for the voluntary repatriation of refugees to their home. Such repatriation cannot take place, however, until a return to normalcy in the area. This normalcy could only follow a political settlement between the Government of Pakistan and the elected representatives of the people of East Pakistan or the emergence of an independent Bangladesh.

Full-scale War between India and Pakistan. In the meantime, the focal point of the United Nations system has concentrated its efforts on emergency relief for the refugees in India and on the promotion of their voluntary repatriation at the earliest possible time. The consortium of governments interested in India's economic development estimated on October 26 the cost of relief for refugees at $700 million for the year ending in March, 1972. The world-wide contributions pledged came to over $200 million.[6] It should be pointed out that the High Commissioner's actions in discharging his focal point duties are entirely separate from UNHCR's usual activities and that presumably he is not responsible to the Executive Committee of UNHCR with respect to these activities.[7] The UNHCR in his capacity as focal point continued his efforts even as fighting between India and Pakistan had broken out.

United Nations Emergency Assistance. The suspension of UNEPRO should not be allowed to cloud the important initiative of the Secretary General and the outstanding work of U.N. personnel in India and in East Pakistan. U Thant's explicit assertion that the Charter requires the Secretary General to take humanitarian action, without any enabling resolution if need be, to save the lives of human beings in time of civil war, is an important development in the authority of the Office of Secretary General under the Charter. It has now been unanimously endorsed by the General Assembly in Resolution 2790 (XXVI) of December 6, 1971. It restores the Secretary General's leadership in humanitarian matters which had been found wanting during the Nigerian civil war. The troubles of UNEPRO also point to the necessity, in conflicts not of an international character, to secure the consent of all parties to the conflict to the functioning of U.N. relief operations. To continue UNEPRO it would have been necessary for the Secretary General to secure not only the agreement of the Government of Pakistan but also that of the Bangladesh leadership, bearing in mind that such purely humanitarian agreement should not have affected either the rights or the status of the parties to the conflict in East Pakistan under the principles outlined in Article 3 of the Fourth Geneva Convention of 1949.

The dimension and élan of Prince Sadruddin Aga Khan's operations in India and of UNEPRO have already in some degree gone beyond the measures contemplated in Economic and Social Council Resolution 1612 (LI) adopted in Geneva in July, 1971, and also in the General Assembly on December 14, 1971, for the appointment of a Disaster Relief Co-ordi-

[6] U.N. Press Release IB/2684, Oct. 28, 1971.

[7] For a comprehensive statement by Prince Sadruddin Aga Khan, see U.N. Doc. A/C.3/SR. 1876, Nov. 18, 1971.

nator. The UNHCR focal point in India, UNEPRO and the General Assembly resolution have virtually put into effect a United Nations emergency assistance service advocated by this writer along principles reviewed in a Panel of the American Society of International Law.[8]

United Nations emergency assistance is unfortunately likely to be needed again. In light of the full-scale war between India and Pakistan, of the Mukti Bahini's operations and the achievement of Bangladesh independence following India's armed intervention, a renewed United Nations effort to come to the assistance of the civilian population in the area will again now probably be required.

GIDON GOTTLIEB

STATUS OF MULTILATERAL TREATIES—RESEARCHER'S MYSTERY, MESS OR MUDDLE?

During the last twelve years the number of treaties registered with the United Nations Secretary General under the provisions of Article 102 of the United Nations Charter has more than doubled, reaching the total of 15,887 in June, 1971. In the same period the number of multilateral treaties for which the U.N. Secretary General exercises depositary functions has risen from 150 in 1960 to 236 in 1971, of which 202 have entered into force.[1] There are, however, no figures available on the estimated

[8] Final Report, President's Commission for the Observance of Human Rights Year, 1968 (1969); Gidon Gottlieb, Topics: "A New Humanitarian Venture for the U.N.," New York Times, Sept. 4, 1970, p. 26, col. 3 (City ed.); *idem*, "International Humanitarian Action," 1969–70 Proceedings and Committee Reports, Am. Branch, Int. Law Ass'n. 67 (1970).

[1] The following table, compiled from data in the Annual Report of the Secretary-General on the Work of the Organization, 1959/60 to 1970/71, illustrates this spectacular growth. The unusual rise in 1970/71 in the number of depository multilateral treaties is explained in the latest report for 1970/71 (U.N. Doc. A/8401, at p. 239) by the fact that certain League of Nations treaties which had not been included in the previous reports have now been added.

Year	Number of Treaties Registered	Total	Depository Multilateral Treaties	Depository Multilateral Treaties in Force
1959/60	647	7,779	150	107
1960/61	720	8,520	157	109
1961/62	724	9,255	161	111
1962/63	779	10,043	166	116
1963/64	728	10,778	167	123
1964/65	725	11,511	167	127
1965/66	530	12,049	172	128
1966/67	579	12,636	178	136
1967/68	624	13,230	179	138
1968/69	598	13,877	184	142
1969/70	1,188	15,073	188	145
1970/71	606	15,887	236	202

grand total of the world's multilateral treaties, nor do there exist any complete listings of all the multilateral treaties concluded under the auspices of, or sponsored by, the more than two hundred existing inter-governmental organizations. Neither have all of them been published in the *United Nations Treaty Series.*[2] The most recent attempt to compile an index to the published texts of multi-party international agreements covered the period from 1596 through 1966 and included 4,148 individual treaty references.[3] What proportion of these international compacts is considered to be presently in force, nobody really knows.

If the exact number of multilateral treaties in force in the world today is unknown, what about information pertaining to their status? What publications or procedures exist that permit the scholar and practitioner to establish, for a particular multilateral treaty, which are the states that are bound by it, or to ascertain in some convenient source what multilateral treaties are in force for a specific subject area, and their member states? Are these publications and procedures adequate?

Complaints about the state of research tools and techniques in international law are not new. Many of these complaints have been directed at the deplorable state of treaty bibliography and the lack of adequate one-source tools for treaty status information. They have been forthcoming from scholars, practitioners, international civil servants, and librarians alike.[4] In recent years some attempts have been made to experiment with

---

Each annual report always names individually the multilateral treaties which have entered into force during the report year. It also lists the new multilateral treaties which have been drawn up and opened for signature since the last report.

[2] The existing gap between the U.N. Treaty Series and the national treaty records has been established by the specialized investigations of Peter H. Rohn of the University of Washington. See his articles, "Canada in the United Nations Treaty Series," 4 Canadian Yr. Bk. Int. Law 102–130 (1966); "Turkish Treaties in Global Perspective," 6 Turkish Yr. Bk. Int. Law 119–160 (1965); and "The United Nations Treaty Series Project," 12 International Studies Quarterly 174–195 (1968). It may be presumed that the gap also applies to the multilateral treaties concluded under the auspices of intergovernmental organizations, especially for the pre-1946 period, as well as to other multiparty treaties.

[3] Harvard University, Law School Library, Index to Multilateral Treaties; a chronological list of multi-party international agreements from the sixteenth century through 1963, with citations to their text (Vaclav Mostecky, Editor; Francis R. Doyle, Asst. Editor. Cambridge, Mass., 1955. pp. x, 301), and its Supplements 1 through 3, covering treaties of 1964, 1965, and 1966. This highly valuable service has been dormant for a number of years. It is to be hoped that it can be revived in the near future.

[4] Covey T. Oliver noted at the Hague Academy of International Law in 1955 that "treaty materials are increasing fantastically in volume, but recording, digesting, cross-referencing, and other research techniques remain underdeveloped, even in countries like the U.S.A., where municipal decisions and statutes are most effectively arranged for legal research purposes." "Contemporary Problems of Treaty Law," 88 Recueil des Cours 483–484 (1955, II); C. Wilfred Jenks observed in 1953 that "even the texts currently in force [of law-making treaties] are not conveniently available," that "information concerning the present status of many instruments is inaccessible or unreliable," and called for a "comprehensive edition of current law-making treaties kept regularly up-to-date, and a current register in accessible form indicating the extent to which they are in force." "The Conflict of Law-Making Treaties," 30 Brit. Yr. Bk. Int. Law 401–453 at 431

electronic data-retrieval techniques in the field of international documentation, including treaties.[5] The development of these modern techniques and their expansion to a degree approaching comprehensiveness for the field is, however, still a dream of the future as far as international law documentation is concerned. It is certainly going to get worse before it gets any better. In the interval, the admittedly inadequate present research tools will have to be called upon to provide answers to international law problems, including the constantly recurring one of the status of multilateral treaties.

When faced with a question of status information for a multilateral treaty (the word "treaty" is being used here in its broad sense, comprising all international agreements under whatever name they may have been concluded), the researcher has available to him a number of publications which provide, up to a point, answers to his queries. Some of these publications are well known; others, while equally useful, may not be as popular. No attempt will be made here to describe them all. Instead, in the following pages we shall discuss, as examples, the different existing types of publications useful to the researcher in his quest for multilateral treaty status information.

One of the researcher's most frequent needs is the necessity to determine whether a particular state is bound by this or that multilateral treaty. A quick answer may often be found in the existing official listings of treaties in force which are published regularly by such states as Germany[6]

(1953); Clifford J. Hynning stated in 1955 that "there is no single source for finding all the treaties and international agreements of the United States. Nor is it possible to determine the present status and significance of a given treaty from any authoritative single source. Nor is there any ready and reliable means of finding court decisions involving treaties and agreements." "Treaty Law for the Private Practitioner," 23 U. of Chicago Law Rev. 67 (1955/56); Paul C. Szasz confirmed ten years later that "it is unduly difficult to determine, without intensive and often involved research, the various rules of international law that may bear upon a given point." "How to Develop World Peace Through Law," 52 ABA Journal 851–857 at 852 (1966); and, finally, in a background paper for a UNITAR panel of specialists, Sydney D. Bailey concluded that "the collection, classification, storage, and retrieval of information relating to international questions has until recently been a rather haphazard affair" and suggested that "research is needed . . . on new techniques for the collection of information, high-speed recording and classification methods, high-density storage, and the use of mechanical aids for rapid retrieval." Peaceful Settlement of Disputes: Ideas and Proposals for Research 34–35 (New York: U.N. Institute for Training and Research, 1970). See also Adolf Sprudzs, Treaty Sources in Legal and Political Research: Tools, Techniques and Problems—The Conventional and the New 62–63 (Tucson: University of Arizona Press, 1971).

[5] A brief description of the U.N. computer-assisted indexing project, the U.S. Department of Defense international agreements project, the Treaty Information Project, directed by Peter H. Rohn at the University of Washington, and the Queens University Treaty Project, directed by Hugh J. Lawford, is available in Sprudzs, *op. cit.* 49–61.

[6] The latest edition is Fundstellennachweis B. Völkerrechtliche Vereinbarungen. Abgeschlossen am 31.12.1970. 3. Aufl. Hrsg. vom Bundesminister der Justiz. Bonn: Bundesanzeiger Verlags GmbH, 1971. 255 pp. (Beilage zum Bundesgesetzblatt, Teil II). The official German treaty collection, Verträge der Bundesrepublik Deutschland. Serie A: Multilaterale Verträge. Hrsg. vom Auswärtigen Amt. (Bonn: Carl Heymanns

and the United States.[7] Such lists have also appeared as one-time ventures for a few other states, either as official[8] or private publications.[9] The recently published *Index to British Treaties, 1101–1968*,[10] while not conceived and construed as an index to treaties in force, provides status information on the multilateral treaties included for Great Britain as well as for other states. Most of the states, however, do not publish official lists of their treaties in force. Treaty texts and announcements concerning ratifications, accessions, entry into force, etc., are published in their official treaty series, or, if there is none, in the collection of laws or the official law gazette.[11] Annual indexes to these official publications usually pro-

Verlag, 1955– date), also includes two supplementary loose-leaf binders which provide status information for the multilateral treaties published in the series. They are, however, much less up to date than the Fundstellennachweis B.

[7] U.S. Dept. of State, Office of the Legal Adviser, Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1 [year], is published annually by the U.S. Government Printing Office in Washington, D.C. Information on current developments is available in the weekly Dept. of State Bulletin, which regularly prints news on ratifications, accessions, entry into force, etc., of bilateral as well as multilateral treaties, provided by the Treaty Section. The listing of multilateral treaties in the annual Treaties in Force volume is arranged under general subject headings, followed by references to published texts, the names of states parties to each treaty and indications of subsequent modifications. Addition of a chronological index for both the bilateral and the multilateral treaty sections would be a welcome further improvement of this excellent and indispensable research aid.

[8] Such as, for example, Nigeria's Treaties in Force for the Period 1st October 1960 to 30th June 1968 (Lagos: Federal Ministry of Justice [1969], pp. 239).

[9] *E.g.*, List of the Treaties that the Republic of Korea Entered Into (1945–1968), 2 Korea Observer (Seoul) 120–148 (July, 1970). In the preface to his Liste des engagements bilatéraux au 30 juin 1969; accords et traités souscrits par la France at 7 (Paris: A. Pedone, 1970, pp. 206), Henri Rollet indicates that a similar list for multilateral treaties in force for France will also be published. It may also be mentioned here that general indexes to legislation, where such are published, usually provide information on treaties, *e.g.*, Wegweiser durch Österreichs Bundesgesetzgebung 1945–1969. Zwanzigste Neuauflage der "Wegweiser"-Serie. Stand vom 1. September 1969. Bearb. von Dr. J. Hans von 1945 bis 31.7.1966 und von Dr. H. Neuhofer ab 1.8.1966 (Ried im Innkreis, Oberösterreichischer Landesverlag, 1969. pp. 175). For other recent examples of such guides to the treaties of individual countries, see Sprudzs, *op. cit.* 41.

[10] An Index to British Treaties, 1101–1968, compiled and annotated under the auspices of the International Law Fund and the British Institute of International and Comparative Law, by Clive Parry and Charity Hopkins (London: H.M.S.O., 1970. 3 vols.). The purpose of this index is mainly to serve as a complete consolidated index to the British Treaty Series, which up to now had annual indexes and consolidated indexes every four years but never had a complete index for the whole series, which began in 1892. The chronological part of the new Index provides the names of states parties to multilateral treaties with the relevant dates and references to amendments and sources of text for each individual treaty. The subject index permits the researcher to find the treaties in the chronological part, if the date is not known. The status information included is as of the end of 1968. For current treaty developments the British Treaty Series includes a Supplementary List of Ratifications, Accessions, Withdrawals, etc., of which now four issues are usually published every year, indicating the actions taken on multilateral and bilateral treaties, as reported to Parliament by the Secretary of State for Foreign and Commonwealth Affairs. See, for example, for 1970, Treaty Series No. 47, Cmnd. 4404; No. 81, Cmnd. 4468; No. 109, Cmnd. 4570; and No. 110, Cmnd. 4670.

[11] There is no up-to-date bibliography of treaty series available. The most recent one

vide for a chronological or subject approach, which permits ascertaining the availability of published status information for that particular state and year. For the most up-to-date status information the cumbersome and time-consuming perusal of all published individual issues of the official publications can hardly be avoided, unless direct access to the official treaty records of the country in question is available.

Some states publish annual listings of bilateral and multilateral treaties concluded during the past year. These may be compiled by officials of the respective treaty services or private scholars, and they may appear in official publications or in privately published scholarly journals.[12] Sometimes special listings for individual states may appear which collect the pertinent treaty status information for a particular subject field [13] or for

---

is the United Nations List of Treaty Collections (New York: U.N. Office of Legal Affairs, 1956, pp. xv, 174 (U.N. Doc. ST/LEG/5)), which was compiled and published as a simplified and updated version of the classic work of Denys P. Myers, Manual of Collections of Treaties and of Collections Relating to Treaties (New York: Burt Franklin [1966]. pp. xlvii, 685 (reprint of the 1922 London edition)). The two major worldwide reference works dealing with legal bibliography, now somewhat out of date, are: Konrad Stollreither's Internationale Bibliographie der juristischen Nachschlagewerke (Frankfurt am Main: Vittorio Klostermann, 1955. pp. xiii, 595) and UNESCO's Catalogue des sources de documentation juridique dans le monde (2d ed. Paris: UNESCO, 1957. pp. 424). Information concerning the legal publications of the many newly independent states of the world is not so readily available and must usually be obtained from various scattered sources.

[12] *E.g.*, the Yearbook of the Dutch Ministry of Foreign Affairs publishes an annual list of the bilateral and multilateral agreements in which the Kingdom of The Netherlands has participated during the past year; see, for example, one of the latest lists entitled "Overzicht van overeenkomsten aan welker totstandkoming in 1969 het Koninkrijk der Nederlanden heeft deelgenomen," 1969/70 Jaarboek van het Ministerie van Buitenlandse Zaken 114–133; see also the annual listings prepared for Belgium by I. de Troyer, Director of the Treaty Section of the Belgian Ministry of Foreign Affairs, and for Greece by Constantin P. Economidès, Director of the Legal Service of the Greek Ministry of Foreign Affairs, the latest examples being, respectively, the "Liste des accords internationaux conclus par la Belgique en 1968," établi par I. de Troyer, 6 Revue Belge de Droit Int. 734–748 (1970), and "Accords internationaux approuvés par la Grèce et publiés au Journal officiel en 1969," liste établi par Constantin P. Economidès, 23 Revue Hellénique de Droit Int. 387–395 (1970). Such lists also appear regularly in a number of other periodicals; *e.g.*, the Annuaire Français de Droit Int., Journal du Droit Int., Revue du Droit Public et de la Science Politique en France et à l'Étranger, Jahrbuch für Int. Recht; Diritto Internazionale, etc.

[13] For example, "Overzicht van overeenkomsten inzake internationale luchtvaart waarbij het Koninkrijk der Nederlanden partij is," 1969/70 Jaarboek van het Ministerie van Buitenlandse Zaken 104–116, presenting information on air transport treaties from the Dutch point of view; "Übersicht über die zweiseitigen Luftverkehrsabkommen der Bundesrepublik Deutschland nach dem Stand vom 15. Oktober 1970," 20 Zeitschrift für Luftrecht und Weltraumrechtsfragen 44–46 (1971), listing bilateral air law treaties for the Federal Republic of Germany; "Conventions en matière d'entr'aide répressive internationale, Circulaire du 30 novembre 1970 du Garde des sceaux, Ministre de la Justice, aux Procureurs généraux," 95 Revue Pénitentiaire et de Droit Pénal 161–166 (1971), containing a list of international agreements binding France in the field of judicial assistance in criminal matters; or, "Navigation Treaties to which Canada is a Party—Treaties in Force Between Canada and Other States Dealing with Navigation Matters," 7 Canadian Yr. Bk. Int. Law 321–322 (1969).

conventions sponsored by a particular inter-governmental organization.[14] Specialized periodicals may regularly cover a particular group of states,[15] a certain subject field,[16] or a specific segment of multilateral conventions[17]

[14] *E.g.*, "Liste des conventions internationales du travail ratifiées par la France," 46 Revue Crit. de Droit Int. Privé 134–137 (1957); the recently published French encyclopedia of international law, Répertoire de droit international, ed. by Ph. Francescakis (Paris: Dalloz, 1968–69, 2 vols.), can be consulted under "Organisation internationale du travail" for a more recent listing established from the point of view of France. This encyclopedia contains additional status information charts, pertaining to the bilateral and multilateral treaties of France, under the following subject entries: "Abordage maritime, Arrêtement maritime, Arbitrage (droit international privé), Assistance et sauvetage maritime, Chèque, Effets de commerce, Enseignement, Entr'aide judiciaire (matière pénale), Extradition, Immunités (des diplomates et des consuls), Impôts, Légalisation (actes publics étrangers), Navigation aérienne, Navire, Notification et signification des actes (matières civiles et commerciales), Organisations européennes, Personne morale, Propriété industrielle, Propriété littéraire et artistique, Sécurité sociale, Transports aériens, Transports maritimes, and Vente commerciale." Status information on International Labor Conventions, as published by the International Labor Office itself, will be referred to later.

[15] For example, Recueil Penant, Revue de Droit des Pays d'Afrique, regularly publishes an annual Panorama de la législation sur les conventions conclues par les états africains d'expression française et par Madagascar, compiled by F. Buhl, the latest having appeared in 80 Recueil Penant 257–269 (1970). A similar list, entitled "Internationale Abkommen" appears regularly for the East European countries and the U.S.S.R. in WGO, Monatshefte für Osteuropäisches Recht; see, *e.g.*, 12 WGO 30–44 (1970).

[16] Status charts of this kind are scattered in many publications. The Committee on Foreign and International Law of the American Association of Law Libraries is attempting to gather data on such published charts showing the status of multilateral treaties. Some of the status charts mentioned in this article have been gathered by committee members under the auspices of this project, and therefore this writer would like to express his appreciation for assistance received to his Co-Chairman Igor I. Kavass, and Committee members Ludwik A. Teclaff, Thomas H. Reynolds, Anita K. Head, Takika Y. Lee, Anthony P. Grech, Liliane Levy, Jan Stepan, S. P. Khetarpal, and Guido Olivera. Several charts dealing with a particular subject field are listed below as examples of information that is available but not widely known. For the field of human rights, the Revue des Droits de l'Homme [Human Rights Journal] publishes a Chart Showing Ratifications of the International Conventions of Human Rights, the last one having appeared in its Vol. 3, pp. 357–367 (1970), and giving the status information as of April 1, 1970, on some 42 conventions; for the status of multilateral treaties dealing with copyright, designs, patents, and trademarks: Copyright (Geneva), Copyright Bulletin (UNESCO), Industrial Property (Geneva), and Gewerblicher Rechtsschutz und Urheberrecht, Int. Teil, carry comprehensive information charts at least once a year, some of the recent references being: "State of Ratifications of and Accessions to the Conventions and Agreements Affecting Copyright on July 1, 1970," 6 Copyright 136–137 (1970); "State of the International Union on July 1, 1970," 9 *ibid.* 120–122 (1970); "Universal Copyright Convention and Annexed Protocols. List of States Having Deposited an Instrument of Ratification, Acceptance or Accession," 4 Copyright Bulletin (UNESCO) 3–11 (1970); "Member States of the World Intellectual Property Organization as on January 1, 1971," 10 Industrial Property (Geneva) (No. 1) 3–4 (1971); "Member Countries of the Industrial Property Unions as on January 1, 1971," *ibid.* 13–22 (1971); "Conventions not administered by WIPO [World Intellectual Property Organization], Contracting States on January 1, 1971," *ibid.* 25–26 (1971); "Übersicht über den Stand der internationalen Verträge auf dem Gebiet des Urheberrechts am 1. Januar 1971," 1971 Gewerblicher Rechtsschutz und Urheberrecht 266–267 (Int. Teil No. 5, May, 1971); "Übersicht über den Stand der internationalen Verträge auf dem Gebiet des gewerblichen

on a comprehensive basis, providing treaty status information for all participating states. Information concerning this or that individual treaty may occasionally be published in a periodical devoted to that particular subject matter.[18] Announcements concerning current treaty developments appear regularly in such official publications as the weekly U.S. *Department of State Bulletin,* the Canadian monthly *External Affairs,* the Dutch *Maandbericht* of the *Tractatenblad,* and the official gazettes, such as the West German *Bundesgesetzblatt, Teil II,* the French *Journal Officiel,* the Belgian *Moniteur Belge,* and many others. Privately published collections of laws, such as the Belgian *Bulletin usuel des lois et arrêtés,* or the *Pasinomie,*[19] which are more accessible to researchers and easier to use than the bulky official gazettes, often contain status charts on multilateral conventions as parts of the decrees announcing ratification or accession.[20]

In cases of multilateral treaties which have been concluded under the auspices of the United Nations, its family of specialized agencies and the many other inter-governmental organizations, status information may be available in publications of the sponsoring organizations.

Status information on multilateral treaties for which the U.N. Secretary General acts as a depositary is available in a U.N. publication entitled

---

Rechtsschutzes am 1. Januar 1971," *ibid.* 268–271. Status charts concerning multilateral treaties pertaining to air transport and navigation have appeared in 19 Zeitschrift für Luftrecht und Weltraumrechtsfragen 265–280 (1970), 6 Rivista di Diritto Int. Privato e Processuale 193, 201 (1970), 7 Il Diritto Aereo 69–72 (1968), and elsewhere; maritime conventions have been covered in 70 Il Diritto Marittimo 251–283 and 443–452 (1968), and in International Maritime Committee, Documentation, 1969, Vol. VI, pp. 88–113; space law in 1971 Le Droit de l'Espace 143–147; personal status conventions in 36 Zeitschrift für Zivilstandswesen 372–374 (1968), and in 6 Rivista di Diritto Int. Privato e Processuale 461–473 (1970).

[17] *E.g.,* the Hague Conventions on Private International Law are regularly covered by several periodicals and other publications. The Revue Crit. de Droit Int. Privé provides annually, in its first quarterly issue, status information on conventions prepared at the 7th (1951) and subsequent sessions, the latest reference at the time of writing being 60 Revue Crit. de Droit Int. Privé 153–157 (1971), while earlier conventions are covered in 56 Revue Critique de Droit Int. Privé 209–213 (1967), and in 2 Rivista di Diritto Int. Privato e Processuale 166–186 (1966); status charts on Hague conventions have also appeared in 14 Nederlands Tijdschrift voor Int. Recht 113–115 (1967); 1969/70 Jaarboek van het Ministerie van Buitenlandse Zaken 94–103; 25 Annuaire Suisse de Droit Int. 361–364 (1968 pub. in 1970), and elsewhere. See also Kurt Nadelmann, "Status of Hague Conventions on Private International Law," 19 A.J. Comp. Law 587–592 (1971).

[18] For example, 1970 Revue de l'Arbitrage 186 gives the news of the ratification by the U.S. of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, and publishes a list of states which have ratified the convention as of Jan. 1, 1971.

[19] Bulletin Usuel des Lois et Arrêtés (Brussels: Bruylant, 1851–date); Pasinomie, Collection Complète des Lois, Arrêtés et Règlements Qui Peuvent Être Invoqués en Belgique (Brussels: Bruylant, 1833–date).

[20] Over the years the Bulletin Usuel des Lois and the Pasinomie, as well as similar private collections of laws published in other states, have provided the researcher with many status charts, taken from official sources. Indexes in each issue and the cumulative annual indexes provide for a quick and easy access to these sources of current information.

Multilateral Treaties in Respect of Which the Secretary-General Performs Depositary Functions.[21] It provides the necessary references to dates of signature, ratification, entry into force, the availability of texts, texts of reservations and declarations made by states, as well as other pertinent notes. A monthly U.N. publication, *Statement of Treaties and International Agreements Registered or Filed and Recorded with the Secretariat during* [month, year] [22] brings this information up to date by providing in its annexes the latest data, as received by the Secretariat, on ratifications, accessions, prorogations, etc., concerning the multilateral treaties on deposit with the United Nations. This information is also available later in the *United Nations Treaty Series* volumes and through its cumulative indexes. News on current U.N. treaty developments is also regularly carried in the *U.N. Monthly Chronicle.* The internal records maintained by the U.N. Treaty Office can always provide up-to-date information on U.N. multilateral treaties which may not as yet be available through the published sources.

Some U.N. specialized agencies, such as the International Labor Organization, the International Atomic Energy Agency, the International Civil Aviation Organization and others, frequently publish texts or lists of agreements registered with them or concluded under their auspices with pertinent status data included.[23] A special situation has developed for

[21] It consists of two volumes, Vol. 1 being published annually, subtitled List of Signatures, Ratifications, Accessions, etc. as at 31 December [year]), and Vol. 2 as a loose-leaf service: Annex: Final Clauses. The publication also includes status information on selected League of Nations treaties for which the U.N. Secretariat performs depositary functions. The latest edition (U.N. Doc. ST/LEG/SER.D/4) brings the status information up to date as of Dec. 31, 1970. The major weakness of this otherwise very valuable research aid is the lack of chronological and subject indexes.

[22] U.N. Doc. symbol ST/LEG/SER.A/290 (for the April, 1971, issue). There is no index.

[23] See, for example, International Labor Office, Conventions and Recommendations Adopted by the International Labour Conference, 1919–1966 (Geneva: 1966. pp. xvi, 1176). More recent status data can be found in the International Labor Conference Report III (Part I), Summary of Reports on Ratified Conventions, which usually covers a period of two years, and the semi-annual official record of ratifications, International Labor Conventions, Chart of Ratifications, published by the ILO Geneva office. See also Agreements Registered with the International Atomic Energy Agency, 3d ed., up to Dec. 31, 1968 (Vienna: International Atomic Energy Agency, 1969, pp. 91 (Legal Series No. 3)), which gives information as to the subject of the agreement, parties to it, date of signature and entry into force, as well as references to publications containing the text of agreement; ICAO Aeronautical Agreements and Arrangements Registered With the Organization, 1 January 1946–31 December 1964 (Montreal: International Civil Aviation Organization, 1965. pp. xv, 165 (Doc. 8473-LGB/215)), which includes a table of parties and has annual supplements, while current information is available in a List of Agreements and Arrangements Concerning Civil Aviation Registered With ICAO, published monthly in English, French and Spanish. It can also be indicated here that specialized treatises devoted to the work of an inter-governmental organization may include appendices showing the state of ratifications for the multilateral treaties concluded under its auspices; see, for example, E. A. Landy's The Effectiveness of International Supervision: Thirty Years of I.L.O. Experience 213–216 (London: Stevens, 1966), showing the state of ratifications of ILO conventions as of June 30, 1964, and C. A. Johnston's The International Labour Organisation: Its Work for Social and

the multilateral legal instruments concluded under the auspices of the General Agreement on Tariffs and Trade (GATT). Those international instruments which the Contracting Parties of GATT had drawn up from its inception on January 1, 1948, until February 1, 1955, were deposited with the Secretary General of the United Nations, who provided and still provides status information on them.[24] For agreements concluded since February 1, 1955, the Director General of GATT has assumed the functions of depositary and the GATT Secretariat provided status information on these instruments in a publication entitled *Status of Multilateral Protocols.* A recently received undated GATT Secretariat circular, in response to a request for a copy of this publication, announced a new loose-leaf service, *Status of Legal Instruments,* which will provide consolidated status information on both groups of agreements—those deposited with the United Nations as well as those deposited with GATT. It will not be limited to the present status of these international instruments (under whatever name they may have been concluded), but will also list instruments and actions which have ceased to have legal effect, or which did not enter into force. This service will also reproduce the relevant final clauses of each instrument, as well as the texts of declarations and reservations made by states upon acceptance. While it is stressed in the announcement that the *Status of Legal Instruments* is not an official GATT document, it has been prepared by the GATT Secretariat and will be kept up to date by the Secretariat free of charge for five years.[25] News on GATT membership is regularly available in its annual publication *Basic Documents* and its report on *GATT Activities in* [year].[26]

Apart from the multilateral treaties sponsored by the United Nations and its specialized agencies, many international multi-party agreements are also concluded under the auspices of other, non-U.N. inter-governmental organizations. There are no complete statistics available on all such treaties, but a conservative estimate would be that their number is at least several hundred strong. No central source of status information for these hundreds of treaties exists, as there is in the case of multilateral treaties deposited with the United Nations. This information is sometimes available in special publications of the organizations themselves. Some regional

---

Economic Progress 314–322 (London: Europa Publications [1970]), which presents a list of ratifications as of Jan. 1, 1970.

[24] See the U.N. publication mentioned earlier, Multilateral Treaties in Respect of Which the Secretary-General Performs Depositary Functions: List of Signatures, Ratifications, Accessions, etc. as at 31 December 1970, pp. 187–199.

[25] Copies of the loose-leaf Status of Legal Instruments, which is available in English or in French, can be ordered from the GATT Secretariat, Villa Le Bocage, Palais des Nations, 1211 Geneva 10, Switzerland. $25.00.

[26] *E.g.,* Contracting Parties to the General Agreement on Tariffs and Trade, GATT Activities in 1969/70, pp. 46–47 (Geneva: 1970). It may also be of interest to note here that a very useful listing of 116 GATT agreements with dates of signatures, entry into force, citations to the United Nations Treaty Series and U.S. sources, as well as indications of U.S. participation, appears as Appendix C, GATT Agreements and United States Proclamations, in John H. Jackson's "The General Agreement on Tariffs and Trade in United States Domestic Law," 66 Mich. Law Rev. 249–332, at 319–331 (1967/68).

organizations, such as the Organization of American States and the Council of Europe, regularly publish status charts for conventions concluded under their auspices.[27] For many of the international agreements of existing inter-governmental organizations, however, no such regular sources of information seem to exist. The researcher is forced to proceed on a case-to-case basis, dealing individually with problems as they arise and relying mainly on the *United Nations Treaty Series,* the documents of inter-governmental organizations, and the national treaty sources.

Two additional general categories of publications which can be helpful in locating status information on multilateral treaties may finally be mentioned. Whenever a significant treatise is published on a specific subject on which multilateral treaties are known to exist, it may often refer to such treaties and include a status information table or a chart. Thus, for example, a recent Belgian treatise on international criminal law[28] provides status information, apparently obtained from the Treaty Section of the Belgian Ministry of Foreign Affairs, on over forty multilateral conventions dealing with international criminal law matters; a French work on international commercial law[29] gives the state of signatures and ratifications on pertinent multilateral treaties, while a German collection of multi-party treaty texts concerned with citizenship problems[30] does the same for the twenty nationality treaties included in the collection. Of course, it is obvious that such information may already be superseded at the time of publication by developments which may have intervened between the preparation and the publication of the book, but nevertheless a subject treatise may definitely serve as a quick first step in the search for status information.

[27] The Organization of American States publishes annually a pamphlet, entitled Status of Interamerican Treaties and Conventions, which provides basic data, while more detailed information is available in Tratados y Convenciones Interamericanos. Firmas, Ratificaciones y Depositos con Notas Explicativas (Washington, D. C.: Organization of American States, 1969. pp. 214 (Serie sobre tratados, 9)). The Directorate of Legal Affairs of the Council of Europe regularly publishes a Chart Showing the Deposit of Ratifications of Council of Europe Conventions and Agreements, while the current developments are covered in Legal Cooperation in Europe, published twice a year as Forward in Europe by the Council of Europe Directorate of Press and Information. Status information on the Council of Europe conventions is also regularly available in the Annuaire Européen [European Yearbook] and various other publications but it is not as up to date there as in the official Council of Europe charts.

[28] Stefan Glaser, Droit international pénal conventionnel at 209–629 (Brussels: Bruylant, 1971. pp. 649), where text excerpts of treaties and status information are arranged under the following main subject headings: "1) Guerre (Crimes contre la paix); 2) Terrorisme; 3) Droit de la guerre (Crimes de guerre); 4) Droits de l'humanité (Crimes contre l'humanité); 5) Problème de la prescription [des crimes de guerre]; 6) Traite des hommes; 7) Stupéfiants; 8) Publications obscènes; 9) Biens culturels; 10) Biens d'utilité publique; 11) Sécurité de circulation; 12) Faux monnayage; 13) Juridiction."

[29] Yvon Loussouarn and J.-D. Bredin, Droit du Commerce International (Paris: Sirey, 1969. pp. x, 1036).

[30] Helmut Hecker, Mehrseitige völkerrechtliche Verträge zum Staatsangehörigkeitsrecht (Frankfurt a.M.: Metzner, 1970. pp. 111) (Sammlung geltender Staatsangehörigkeitsgesetze, 30).

The other category is represented by various types of loose-leaf services devoted to a specific subject field which frequently include status information on treaties relevant to their subject, in addition to the texts of these treaties or excerpts from them. Some of these services have been in existence for a considerable period of time and are well known, *e.g.*, the *Copyright Laws and Treaties of the World*,[31] the *Quellen des Urheberrechts*,[32] the *Design Laws and Treaties of the World*,[33] Gruetzner's *Internationaler Rechtshilfeverkehr in Strafsachen*, Teil III: *Mehrseitige Abkommen*,[34] or Makarov's *Quellen des internationalen Privatrechts*.[35] Others, of more recent origin, such as White's and Ravencroft's *Trademarks Throughout the World*[36] or the *Manual of Industrial Property Conventions*[37] may be equally useful for their respective subject fields. As in the case of subject treatises, status information available in these and other loose-leaf services may provide the basic answer to a question, but must be updated through the use of other sources.

The foregoing discussion of conventional treaty research tools, by no means to be considered exhaustive or complete, has illustrated the many types of sources to be consulted by the researcher in his quest for status information on multilateral treaties. While the road to this information does seem to be clouded with mystery to some, and the impatient may characterize the whole process as a mess, to most researchers the search for the up-to-date answer presents itself as a muddle-through, with uncertain results. This situation will probably not change much until the day when the uncertainty and growing confusion will become intolerable not only to the scholar and the practitioner but also to governments and the international community as a whole. At that point a project for a

[31] Copyright Laws and Treaties of the World, edited by Arpad L. Bogsch [et al.] (Paris: UNESCO; Washington, D. C.: The Bureau of National Affairs, Inc., 1956–date, 2 vols. (loose-leaf)), where status information is indicated for each relevant multilateral convention and country. A French edition, Lois et traités sur le droit d'auteur, has been published for UNESCO by the Librairie Générale de Droit et de Jurisprudence in book form and is kept up to date by annual supplements which include status information.

[32] Quellen des Urheberrechts. Gesetzestexte aller Länder und Tabellen über internationale Verträge mit systematischen Einführungen. Herausgeber: Philipp Moehring, Eugen Ulmer, Erich Schulze [und] Konrad Zweigert (Frankfurt a.M.: Metzner, 1960–date. 3 vols. (loose-leaf)).

[33] Design Laws and Treaties of the World, including references to the protection of works of applied art. Editor: Arpad L. Bogsch (Leiden: Sijthoff; Washington, D.C.; The Bureau of National Affairs, Inc., 1960–date. 1 vol. (loose-leaf)).

[34] Heinrich Gruetzner, Internationaler Rechtshilfeverkehr in Strafsachen (Hamburg: R. v. Decker's Verlag, G. Schenck, 1955–date. 6 vols. (loose-leaf)), specifically, Teil III: Mehrseitige Abkommen, in which the status information as provided is based on announcements in the German Bundesgesetzblatt.

[35] A. N. Makarov, Quellen des internationalen Privatrechts—Recueil des textes concernant le droit international privé (Berlin: Walter de Gruyter, 1960–date. 2 vols. (loose-leaf) (Materialien zum ausländischen und internationalen Privatrecht, 4)), specifically, Bd. II: Texte der Staatsverträge [Textes des traités internationaux].

[36] Wm. W. White and B. G. Ravenscroft, Trademarks Throughout the World (New York: Trade Activities, Inc., 1966–date. 1 vol. (loose-leaf)).

[37] United International Bureaux for the Protection of Intellectual Property, Manual of Industrial Property Conventions (Geneva: 1965–date. 1 vol. (loose-leaf)).

centralized multilateral treaty status information service might be conceived and executed. It would require the swift and unreserved co-operation of the major depositaries of multilateral treaties, as well as of the treaty officers of many governments to produce the world-wide equivalent of the U.S. *Treaties in Force* or of the U.N. *Multilateral Treaties in Respect of Which the Secretary-General Performs Depositary Functions*, that would include the status information on the total of the world's multilateral treaties in force. Such a day, however, does not seem to be in sight yet.

ADOLF SPRUDZS *

INTERNATIONAL COLLOQUIUM ON FEDERALISM AND THE INTEGRATION OF LEGAL SYSTEMS

A special international colloquium on the theme, "Federalism and the Integration of Legal Systems, with Special Reference to the Rôle of Supreme Courts," will be held in Luxembourg in the period July 15 to August 4, 1972, at the seat of the Université Internationale de Sciences Comparées in Luxembourg. Judge Pierre Pescatore, of the Court of Justice of the European Community, and Professor Edward McWhinney, of the Indiana University Law School, Indianapolis, will be Joint Directors of the colloquium. The Teaching Faculty will include Judge Manfred Lachs of the World Court; Professor Gerhard Leibholz, Judge of the West German Constitutional Court; Professor Aldo M. Sandulli, Judge of the Italian Constitutional Court; Professor W. J. Ganshof van der Meersch, Judge of the Conseil d'Etat of Belgium; Professor T. Koopmans of Leiden; Professor Robert Kovar of Nancy; Professor Ronald Graveson of London: Professor Ernst Wolf of Basle; Professor Carl Friedrich of Harvard; and Professor Boris Blagojevic of Yugoslavia.

Further information concerning the colloquium (including information as to scholarships and grants-in-aid for attendance at the colloquium), may be obtained by writing to Dr. Ernest Arendt, President, 13 rue du Rost, Luxembourg.

EDWARD MCWHINNEY

CORRIGENDUM

My account of Professor Jennings' article on "The Limits of Continental Shelf Jurisdiction" (65 A.J.I.L. at 672 (October, 1971)) is not entirely correct. Professor Jennings, later in his article, does of course mention the International Court's qualification of the coastal state's *ipso facto* prolongation of its land territory, which was cited in my article, though not with respect to the continental slope, over which he regards the coastal state's sovereignty as absolute. With respect to land mass beyond the

* Foreign Law Librarian and Lecturer in Legal Bibliography, The University of Chicago Law School.

slope, Jennings dissolves the "adjacency" concept by stating that "adjacency comprehends the idea of appurtenance of the prolongation of the land domain." This, rather than the exploitability test, which provides "no reasonably practical and clear outer limit" and may be *"functus officio,"* is the criterion which Jennings substitutes, with the general result that "exploitability" as well as "adjacency" gives way to a prolongation of the coastal state's sovereignty that, hardening from state practice into custom, is likely to engulf the continental margin. This extension of coastal state sovereignty over the continental land mass has been cogently criticized by Professor Andrassy (*International Law and the Resources of the Sea,* pp. 170 *et seq.* (1970)). Andrassy points out that

> . . . if exclusive jurisdiction is to be allotted to the natural prolongation of the land as an inseparable part of the continent, *all* countries of the continent should have the right to a share in this extension of rights, and not only those that are situated on the coast. Since the oceanbed sediment in which there is so much interest has originated over millions of years in the land from which material is carried by rivers into the sea, it would be highly inequitable to deny a share of these resources to a country whose rivers contributed to their accumulation. This would give certain rights to landlocked countries, which are altogether excluded from the benefits that have accrued to the coastal states, as the law now stands.

WOLFGANG FRIEDMANN

CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

The material for this section is compiled by Steven C. Nelson, Office of the Legal Adviser, Department of State.

The references in the headings are to sections of the *Digest of International Law* prepared by Marjorie M. Whiteman (1963 to date) dealing with the same subject matter as the material presented. Cross-references indicate material which directly pertains to more than one heading in the *Digest*.

INTERNATIONAL LAW

Source: Custom (1 Whiteman's *Digest*, Ch. I, §6)

See Aviation: Public Air Law: Crimes on Board Aircraft, below.

STATES, TERRITORIES, AND GOVERNMENTS

Corpus Separatum: Jerusalem (1 Whiteman's *Digest*, Ch. II, §33)

See Armed Conflict: Belligerent Occupation, below.

TERRITORIAL SEA AND CONTIGUOUS ZONES

Innocent Passage: Duties and Rights of Coastal State (4 Whiteman's *Digest*, Ch. IX, §§14–15)

On November 6, 1971, the U.S. Atomic Energy Commission conducted an underground nuclear test explosion on Amchitka Island, in the Aleutians. The following notice was issued by the Department of State on November 1, 1971. An identical notice, covering the period November 5–7, was issued on November 4.

> Pursuant to Article 16 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, the right of innocent passage within three nautical miles of Amchitka Island (51 Degrees 25 Minutes N, 179 Degrees 10 Minutes E) is suspended temporarily from 0001X November 2, 1971, to 2400X November 4, 1971, inclusive, Bering Sea Daylight Time due to U.S. Atomic Energy Commission experiment.

(Dept. of State Press Releases No. 252, Nov, 1, 1971, and No. 255, Nov. 4, 1971; reprinted at 65 Dept. of State Bulletin 599 (1971).)

STATE RESPONSIBILITY FOR INJURY TO ALIENS

Acts Affecting the Person of the Alien: Detention and Personal Injury Cases (8 Whiteman's *Digest*, Ch. XXIV, §§15–16)

and

HIGH SEAS

Freedom of the Seas (4 Whiteman's *Digest*, Ch. X, §2)

The following statement was released by the Department of State on December 17, 1971:

In clear violation of international law, the Cuban Government in the last two weeks, has attacked and seized two unarmed commercial vessels in the Caribbean. In one case the captain of the vessel was an American citizen who was wounded in the attack and who is at present unlawfully detained in Cuba. Following the seizures of the two vessels, the Government of Cuba on December 15 declared its intention to continue these attacks and seizures "at any distance from our coast."

The United States Government considers these armed attacks upon commercial vessels and the statement that Cuba intends to continue such attacks to constitute a clear and present threat to freedom of navigation and international commerce in the Caribbean and a threat to American citizens. Such threats are intolerable. The United States Government is prepared to take all measures under international law to protect US citizens and freedom of the seas against these attacks in this area.

(Read at afternoon press briefing, December 17, 1971.)

The following are excerpts from the December 15 statement of the Cuban Government (unofficial translation from the Cuban newspaper "Granma" of December 15, 1971) referred to in the State Department release:

Today at 1315 hours between the small islands of Inagua and West Caicos 120 miles from Punta Maisi one of the units of the Revolutionary Navy that stands guard against pirate landings at the service of the Central Intelligence Agency of the United States which has been harassing our territory, sighted the ship *Johnny Express* which together with the *Laila Express* and others of the shipping firms owned by the Babuns, known agents of imperialism, has participated in piratical actions, introduction of arms and counter-revolutionary elements in our country.

Commanded to stop for boarding and seizure, the pirate ship disobeyed the order, intending to escape. Minutes later it was obliged to obey, being boarded by Cuban officers who in the evening of today conducted it toward the northern coast of Oriente Province.

* * * * *

The revolutionary government of Cuba will not hesitate to act at any distance from our coasts where these pirate vessels are operating under whatever flag or camouflage carrying out such crimes against our country.

STATE RESPONSIBILITY FOR INJURIES TO ALIENS

Acts Affecting Property Rights of the Alien: Damages for Expropriation or Other Taking or Loss of Property: Adequate Compensation (8 Whiteman's *Digest*, Ch. XXIV, §32)

The following is a statement by Secretary of State William P. Rogers, released by the Department of State on October 13, 1971:

The Controller General of Chile announced his findings on October 11 that no compensation would be paid for the U.S. copper mining investments expropriated on July 16 except for modest amounts in the cases of two smaller properties.

The United States Government is deeply disappointed and disturbed at this serious departure from accepted standards of international law. Under established principles of international law, the expropriation must be accompanied by reasonable provision for payment of just compensation. The United States had made clear to the Government of Chile its hope that a solution could be found on a reasonable and pragmatic basis consistent with international law.

It appears that the major factor in the Controller General's decision with respect to the larger producers was the determination on September 28 of alleged "excess profits." The unprecedented retroactive application of the excess profits concept, which was not obligatory under the expropriation legislation adopted by the Chilean Congress, is particularly disquieting. The U.S. companies which are affected by this determination of the Chilean Government earned their profits in Chile in accordance with Chilean law and under specific contractual agreements made directly with the Government of Chile. The excess profits deductions punish the companies today for acts that were legal and approved by the Government of Chile at the time. No claim is being made that these excess profits deductions are based on violations of Chilean law. This retroactive determination has serious implications for the rule of law.

Should Chile fail to meet its international obligations, it could jeopardize flows of private funds and erode the base of support for foreign assistance, with possible adverse effects on other developing countries. The course of action which the Chilean Government appears to have chosen, therefore, could have an adverse effect on the international development process.

The United States hopes that the Government of Chile, in accordance with its obligations under international law, will give further careful consideration to this matter.

(Dept. of State Press Release No. 234, Oct. 13, 1971; reprinted at 65 Dept. of State Bulletin 478 (1971).)

AVIATION

Public Air Law: Crimes on Board Aircraft (9 Whiteman's *Digest*, Ch. XXVI, §15)

The Council of the International Civil Aviation Organization, in two resolutions adopted on October 1, 1970, requested the Legal Committee of the Organization to study two matters relating to action by states against other countries that fail to discharge their obligations with respect to unlawful interference with international civil aviation. One, proposed by the United States, was the question of action that should be taken against "any State which after the unlawful seizure of an aircraft, detains passengers, crew or aircraft contrary to the principles of Article 11 of the

Tokyo Convention, for international blackmail purposes, or any State which, contrary to the principles of Articles 7 and 8 of the Draft Convention on Unlawful Seizure of Aircraft, fails to extradite or prosecute persons committing acts of unlawful seizure for international blackmail purposes." The other, proposed by Canada, was "to consider whether a special clause could be elaborated providing for enforcement of international legal obligations relating to unlawful interference with international civil aviation" for incorporation in bilateral air agreements.

In the meeting of the special Subcommittee established by the Legal Committee to consider the two resolutions, the United States and Canada submitted a joint proposal in the form of a draft convention. The following statements about the views of the sponsors of the proposal appear in the report of the Subcommittee:

* * * * *

The essential purpose of that draft convention is to provide for a system for speedy consultations among States which are specially interested if there is non-observance by another State of its obligations under international law in relation to cases of unlawful seizure of aircraft or cases of unlawful interference with international civil aviation. The object of such consultations would be to decide on the taking of concerted measures against a State found to be in default, not excluding measures of suspension of international air navigation to or from that State. The taking of such concerted measures would be based upon a determination previously made by an international body that a particular State had been in default with regard to observance of its obligations under international law.

The authors of the Canada-USA proposal explained that the legal obligations of a State mentioned above are those under general international law without depending on particular treaty obligations such as the Tokyo Convention, the Hague Convention for the Suppression of Unlawful Seizure of Aircraft, December 1970, or the convention expected to be adopted in September 1971 on the subject of unlawful interference with international civil aviation.

. . . [I]t was commented that the draft convention made no mention of the cases where an aircraft was detained for lawful reasons; for example, under an attachment or court order, seizure for debts of the operator or owner of the aircraft, or in case of war. In the last-mentioned connection, reference was made to the Geneva Convention relative to the Protection of Civilian Persons in Time of War of August 12, 1949, and Article 4A (5) of the Geneva Convention of the same date relative to the Treatment of Prisoners of War. The authors of the proposal stated their view that under general customary international law, and without relying on the Tokyo Convention or The Hague Convention of 1970, it was the duty of a State to facilitate the continuation of the journey of the passengers and crew and to return the aircraft to persons lawfully entitled to possession in the case where an unlawful seizure of aircraft had occurred; that the application of the proposed convention was not to be automatically suspended in case of war and that the Tokyo and Hague Conventions did not make any exceptions with regard to their applicability in case of war; that the reference to treatment of civilian aircraft crews in the Geneva Convention

may well have been supplemented by recent developments in customary international law; that the State of landing had the obligation immediately to release all passengers and crew "without exception", and they cited the Resolution adopted by the U.N. Security Council on 9 September 1970 in which it is stated that "The Security Council . . . Appeals to all parties concerned for the immediate release of all passengers and crews without exception, held as a result of hijackings and other interference in international travel . . ." . It would seem, in the opinion of the two sponsoring Delegations, to follow that detention of an unlawfully seized aircraft, its passengers and crew cannot be justified by any reason whatsoever, including belligerent claims.

It was noted that while Article 11 of the Tokyo Convention spoke of the landing State permitting the passengers and crew to leave, the Canada-USA proposal was based on the language of The Hague Convention of December 1970. The authors stated that the latter wording which spoke of a State "facilitating" the continuation of the passengers' and crew's journey represented more correctly a State's obligation under general international law. Some members did not share this view.

* * * * *

(Report, Subcommittee on the Council Resolutions of October 1, 1970, (Montreal, April 14–27, 1971) at 2–3, ICAO Doc. LC/SC CR-Report (1971).)

ARMED CONFLICT

Conduct of Hostilities: Prohibited Weapons (10 Whiteman's *Digest*, Ch. XXIX, §14)

The following are letters from the General Counsel of the Department of Defense to the Chairman of the Senate Foreign Relations Committee setting forth the views of the Department of Defense with regard to the use in war of chemical agents for crop destruction:

5 April 1971

Honorable J. W. Fulbright
Chairman, Committee on Foreign Relations
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

Pursuant to your request as the Chairman of the Senate Foreign Relations Committee made during the Hearings of March 22, 1971, on the Geneva Protocol of 1925, this statement constitutes an opinion from the Office of General Counsel, Department of Defense, concerning the application of the Hague Regulations of 1907 to the destruction of crops through chemical agents. This opinion, in the spirit of your question, extends beyond the literal text of the 1907 Hague Regulations. Moreover, this opinion will embrace the use of defoliants and antiplant chemicals in general.

It is our opinion and that of the Judge Advocate Generals of the Army, Navy and Air Force that neither the Hague Regulations nor the rules of customary international law applicable to the conduct of war and to the weapons of war prohibit the use of antiplant chemicals for defoliation or the destruction of crops, provided that their use against crops does not cause such crops as food to be poisoned nor cause human beings to be poisoned by direct contact, and such use must not cause unnecessary destruction of enemy property.

The standard of lawfulness, with respect to the use of this agent either as a defoliant or as a means to destroy crops, under the laws of war, is the same standard which is applied to other conventional means of waging war. International law and the laws of war are prohibitive in nature (*United States v. List, et al.*, Vol. XI, TRIALS OF WAR CRIMINALS, USGPO, Washington, 1950, at p. 1247). Hence, in order to be unlawful, the use of a weapon in the conduct of war must either be prohibited by a specifically agreed-upon rule, or its use must be such as would offend the general principle of humanitarianism, that is to say, such as would cause unnecessary destruction of property or unnecessary human suffering.

The pertinent article in the Hague Regulations of 1907 is Article 23, which is in the "Regulations Respecting the Laws and Customs of War on Land," annexed to the Hague Convention of 1907 (IV), "Respecting the Laws and Customs of War on Land." Paragraphs (a), (e) and (g) read as follows:

> "Article 23. In addition to the prohibitions provided by special Conventions, it is especially forbidden—
>
> "a. To employ poison or poisoned weapons; . . .
>
> "e. To employ arms, projectiles, or material calculated to cause unnecessary suffering; . . .
>
> "g. To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war; . . ."

A discussion of Hague Regulation Article 23(a), relating to poisons and poisoned weapons, is set forth in paragraph 37 on page 18 of the Department of the Army Field Manual, FM-27-10, entitled "The Law of Land Warfare" (dated July 1956). It reads in its entirety:

> "37. Poison
>
> "a. *Treaty Provision.*
>
> "It is especially forbidden . . . to employ poison or poisoned weapons. (HR, art. 23, par. (a).)
>
> "b. *Discussion of Rule.* The foregoing rule does not prohibit measures being taken to dry up springs, to divert rivers and aqueducts from their courses, or to destroy, through chemical or bacterial agents harmless to man, crops intended solely for consumption by the armed forces (if that fact can be determined)."

The discussion in paragraph 37 of the Manual is based on the standard set forth above to the effect that a prohibition against the use of one type of weapon, i.e., poison or poisoned weapons, does not effect any prohibi-

tion on the use of other weapons and, in particular, it does not prohibit the use of chemical herbicides for depriving the enemy of food and water. This discussion does not regard chemical herbicides, harmless to man, as poison or poisoned weapons, for if they had been so considered, their use against crops intended solely for the consumption by the enemy's armed forces would clearly have been prohibited by Article 23(a) of the Hague Regulations. As the discussion points out, such a use does not fall within the prohibition.

We therefore believe that the correct interpretation of paragraph 37(b) is that the use of chemical herbicides, harmless to man, to destroy crops intended solely for consumption by the enemy's armed forces (if that fact can be determined) is not prohibited by Article 23(a) or any other rule of international law. It involves an attack by unprohibited means against legitimate military objectives. But an attack *by any means* against crops intended solely for consumption by noncombatants not contributing to the enemy's war effort would be unlawful for such would not be an attack upon a legitimate military objective.

Where it cannot be determined whether crops were intended solely for consumption by the enemy's armed forces, crop destruction would be lawful if a reasonable inquiry indicated that the intended destruction is justified by military necessity under the principles of Hague Regulation Article 23(g), and that the devastation occasioned is not disproportionate to the military advantage gained. In *United States v. List, et al.* (Vol. XI, TRIALS OF WAR CRIMINALS, pp. 1296–1297), the Nuremberg Tribunals affirmed this principle.

The thrust of the phrase "harmless to man" made part of the discussion of the rules draws attention to Article 23(e) of the Hague Regulations of 1907, wherein combatants are forbidden to employ weapons "calculated to cause unnecessary suffering." However, the provision in Hague Regulation Article 23(a) concerning the prohibition against using poison or poisoned weapons is a special case of this rule since it, in effect, declares that any use of a lethal substance against human beings is, *per se*, a use which is calculated to cause unnecessary suffering.

The Geneva Protocol of 1925 adds no prohibitions relating to either the use of chemical herbicides or to crop destruction to those described above. Its preamble declares that its prohibition shall extend to "the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices." Bearing in view that neither the legislative history nor the practices of States indicate that the Protocol draws chemical herbicides within its prohibitions, any attempt by the United States to include such agents within the Protocol would be the result of its own policy determination, amounting to a self-denial of the use of the weapons. Such a determination is not compelled by the 1907 Hague Regulations, the Geneva Protocol of 1925 or the rules of customary international law.

* * * * *

Sincerely,

J. FRED BUZHARDT

Honorable J. W. Fulbright
Chairman, Committee on Foreign Relations
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

Secretary Laird has asked me to respond to your letter dated April 8, 1971, requesting whether any legal review of the crop destruction program in Vietnam was made by the Department of Defense, the Army or the Air Force before the program was initiated.

A review was made of the use of chemical herbicides for the destruction of crops on January 11, 1945, by Major General Myron C. Cramer, The Judge Advocate General, War Department. A copy of General Cramer's opinion is attached. As that opinion points out, it was the position of the Judge Advocate General after an exhaustive study of the relevant materials, that no rule of international law prohibited the use of chemical herbicides for the destruction of crops subject to the qualifications which were also set forth and discussed in our opinion dated April 5, 1971. There is no indication in our files that the 1945 opinion was ever overruled or modified. Though antedating the Vietnam conflict, General Cramer's opinion clearly encompasses the activities that have taken place in Vietnam and reflects the same position which we have taken.

* * * * *

Sincerely yours,
J. FRED BUZHARDT

(10 Int. Legal Materials 1300–1304 (1971); the opinion referred to in the second letter is reprinted *ibid.* at 1304–1306.)

Belligerent Occupation (10 Whiteman's *Digest*, Ch. XXIX, §16)

On September 25, 1971, Ambassador George Bush, U.S. Representative in the U.N. Security Council, made the following statement:

. . . In our view, the ultimate status of Jerusalem should be determined through negotiation and agreement between the Governments of Israel and Jordan in the context of an overall peace settlement, taking into account the interests of its inhabitants, of the international religious communities who hold it sacred, and of other countries in the area.

* * * * *

Earlier in 1969 in this hall, my distinguished predecessor Charles Yost addressed himself more specifically to the kinds of matters which are responsible for our presence here today. He said, and let me just review it briefly: "The expropriation or confiscation of land, the construction of housing on such land, the demolition or confiscation of buildings, including those having historic or religious significance, and the application of Israeli law to occupied portions of the city are detrimental to our common interests in the city." He noted as well that the United States considers that part of Jerusalem which came under Israeli control, like other areas oc-

cupied by Israel in the June 1967 war, as occupied territory and thereby subject to the provisions of international law governing the rights and obligations of an occupying power.

We regret Israel's failure to acknowledge its obligations under the Fourth Geneva Convention as well as its actions which are contrary to the letter and spirit of this convention. We are distressed that the actions of Israel in the occupied portion of Jerusalem give rise to understandable concern that the eventual disposition of the occupied section of Jerusalem may be prejudiced. The Report of the Secretary General on the Work of the Organization, 1970–71, reflects the concern of many governments over changes in the face of this city. . . .

(65 Dept. of State Bulletin 469 (1971); U.N. Doc. S/PV.1582, at 166–167 (1971).)

Belligerent Interference with Neutral Commerce

Contraband (10 Whiteman's *Digest,* Ch. XXXI, §§2–9)

At the request of the Department of State on December 9, 1971, the following Special Warning was transmitted to merchant vessels of American registry by the U.S. Naval Oceanographic Office:

"Shipowners and shipmasters are notified that India and Pakistan have instituted contraband procedures in accordance with official announcements reported below. Neutral ships may be subject to visit and search on the high seas or in port of either belligerent country. Resistance by neutral ships could result in use of force to effect visit and search and could risk seizure and forfeiture of cargo and vessel. Masters of vessels subjected to visit and search should immediately report circumstances to nearest American Consul.

"The following proclamation as to contraband of war was issued by the Government of Pakistan on Dec. 3, 1971:

> Whereas a state of war exists between Pakistan on one hand and India on the other:
>
> And Whereas it is necessary to specify articles which it is the intention of the Government of Pakistan to treat as contraband of war:
>
> Now, therefore, it is hereby declared by the Government of Pakistan that, during the continuance of the war, or until further public notice is given, articles enumerated in the schedule hereto will be treated as contraband:
>
> Schedule—
>
> (a) All kinds of arms and ammunition and explosives, their components and ingredients including chemicals, radioactive materials.
>
> (b) Crude oil and fuel and lubricants of all kinds.
>
> (c) All means of transportation on land, in water or air, and components and parts thereof.
>
> (d) Electronics and telecommunication equipment.
>
> (e) Optical equipment specially designed for military use.
>
> (f) Precious metals and objects made thereof, coins, bullion, currency; evidence of debts, debentures, bonds, coupons, stocks and shares of any negotiable or marketable security; precious and semi-precious stones, jewels.

"The following declaration of contraband was issued by the Government of India on Dec. 4, 1971:

> Whereas the security of India is threatened by the aggression of Pakistan and by the armed conflict initiated by it and it is necessary to specify the articles which are intended to be treated as contraband of war.
>
> Now, Therefore, the Government of India do hereby declare that during the continuance of this armed conflict or until the Government of India give further public notice the articles enumerated in the schedule hereto will be treated as contraband of war.
>
> The Government of India reserves the right to add, delete or modify the schedule as and when it finds necessary.
>
> Schedule—
>
> The following articles shall be treated as contraband of war:
>
> 1. Arms of all kinds, including arms for sporting purposes, and their distinctive component parts.
>
> 2. Projectiles, charges and cartridges of all kinds, and their distinctive component parts.
>
> 3. Powder and explosives specially prepared for use in war.
>
> 4. Gun mountings, limberboxes, limbers, military wagons, filed forges, and their distinctive component parts.
>
> 5. Clothing and equipment of a distinctively military character.
>
> 6. All kinds of harness of a distinctively military character.
>
> 7. Saddle, draught, and pack animals suitable for use in war.
>
> 8. Articles of camp equipment, and their distinctive component parts.
>
> 9. Armour plates.
>
> 10. Warships, including boats, and their distinctive component parts of such a nature that they can only be used on a vessel of war.
>
> 11. Aeroplanes, airships, balloons, and aircraft of all kinds, and their component parts, together with accessories and articles recognizable as intended for use in connection with balloons and [aircraft?].
>
> 12. Implements and apparatus designed exclusively for the manufacture of munitions of war, for the manufacture or repair of arms, or war material for use on land and sea.
>
> 13. Surface to surface missiles, surface to air missiles, air to surface rockets and guided missiles and warheads for any of the above weapons: mechanical or electronic equipment to support or operate the above items.
>
> 14. Any other class of materials or items as may assist the enemy in the prosecution of the armed conflict against the Union of India."

CERTAIN LEGAL PROBLEMS COMMON TO INTERNATIONAL ORGANIZATIONS

Privileges and Immunities: Representatives of Members (13 Whiteman's *Digest,* Ch. XXXVIII, §9)

Following the adoption of General Assembly Resolution No. 2758 (XXVI), October 25, 1971,[1] whereby the representatives of the People's Republic of China were recognized as the "only legitimate representatives of China to the United Nations," the following announcement was made concerning travel restrictions applicable to members of the Mission of the People's Republic of China:

[1] U.N. Doc. A/RES/2758 (XXVI) (1971), 65 Dept. of State Bulletin 556 (1971).

The Department of State has decided to extend travel restrictions to members of the Mission of the People's Republic of China comparable to those applied to the Soviet Mission.

A diplomatic note indicating this and outlining these restrictions was delivered to the PRC Mission last night.

The communication stated that the travel regulations would be applicable to the PRC Representatives and "to others who may apply to enter this country in connection with United Nations affairs."

In general the restrictions require 48-hour notification of travel outside of a 25-mile radius of New York City. As with representatives of the USSR and certain other countries there are various areas throughout the country which are closed to travel.

(Press Release USUN-185 (71), Nov. 12, 1971.)

Membership: Expulsion, Suspension, Forced Withdrawal, and Forced Non-Participation; and *Representation* (13 Whiteman's *Digest*, Ch. XXXVIII, §§ 13, 14)

The following are excerpts from statements by Secretary of State William P. Rogers and United States Representative to the United Nations George Bush setting forth the views of the United States on Chinese representation in the United Nations:

STATEMENT BY SECRETARY ROGERS ON AUGUST 2, 1971

* * * * *

No question of Asian policy has so perplexed the world in the last 20 years as the China question—and the related question of representation in the United Nations. Basic to that question is the fact that each of two governments claims to be the sole government of China and representative of all of the people of China.

Representation in an international organization need not prejudice the claims or views of either government. Participation of both in the United Nations need not require that result.

Rather, it would provide governments with increased opportunities for contact and communication. It would also help promote cooperation on common problems which affect all of the member nations regardless of political differences.

The United States accordingly will support action at the General Assembly this fall calling for seating the People's Republic of China. At the same time the United States will oppose any action to expel the Republic of China or otherwise deprive it of representation in the United Nations.

Our consultations, which began several months ago, have indicated that the question of China's seat in the Security Council is a matter which many nations will wish to address. In the final analysis, of course, under the charter provision, the Security Council will make this decision. We, for our part, are prepared to have this question resolved on the basis of a decision of members of the United Nations.

* * * * *

QUESTIONS AND ANSWERS

* * * * *

Q. Mr. Secretary, from the wording of this statement, it would appear that the United States would be also in favor of the seating of both Viet-Nams, both Koreas, and both Germanys. Is that a correct assumption?

A. No, I don't think that is a correct assumption. We are dealing now with a problem of representation in the United Nations of a country that has been represented in the United Nations since its beginning. That is not true in the case of the other divided countries. So the statement does not direct itself to that point.

* * * * *

Q. Mr. Secretary, the charter provides that the expulsion of a member is an important question. But what about the expulsion of a delegation?

A. Well . . . that is a matter of tactics. We believe that the expulsion question insofar as it relates to the Republic of China is an important question. And that is going to be our position this fall.

(Dept. of State Press Release No. 166, Aug. 2, 1971; reprinted at 65 Dept. of State Bulletin 193–196 (1971).)

STATEMENT BY AMBASSADOR BUSH IN PLENARY SESSION
OCTOBER 18, 1971

* * * * *

. . . [W]ith the help of many governments sitting here today, we proceeded to shape an alternative to the Albanian resolution. The final result is embodied in a draft resolution whose text appears in document A/L.633. It is cosponsored by 19 members including the United States.

* * * * *

I need comment only briefly on this draft resolution. Its terms are simple and direct. In essence, it recommends that the People's Republic of China take over China's place as a permanent member of the Security Council and provides representation both for the People's Republic of China and for the Republic of China in the General Assembly.

* * * * *

Moreover, this resolution, while achieving these things, has been very carefully written in order to avoid any prejudice to related matters. It does not ask member states to alter their recognition policies or their bilateral relations. It does not ask that. It does not in any way purport to divide China into two separate states or to commit those who vote for it on how they may in the future regard the legal or the diplomatic situation of the parties involved. It does not take either a "two-Chinas" position or a "one-China, one-Taiwan" position or in any other way seek to dismember China. It is simply founded on the reality of the present situation as we all know it to be, but it does not seek to freeze this situation for the future. On the contrary, it expressly states in the preamble that a solution should be sought without prejudice to a future settlement.

We are aware that some, although recognizing this as a political initiative to solve a practical political problem, have raised legal questions. It is unavoidable that what we propose should be new, because the situation that we are dealing with in October 1971 is unique. But the charter, which is flexible enough to allow for the representation of Byelorussia, the Ukraine, and the U.S.S.R., is certainly flexible enough to accommodate this situation. Therefore, we have sought to develop a resolution that is compatible with the law of the charter and which recognizes that if the U.N. is to be strong and keep pace with the times, it cannot and it must not be afraid to innovate.

* * * * *

There is another proposal before the Assembly: the Albanian resolution. It would not only admit the People's Republic of China but would also, in the same stroke, "forthwith" expel the Republic of China from the United Nations and all its organs.

The act of expulsion, fellow delegates, is the issue before us today. Both sides agree that the People's Republic of China should be admitted, and both are in agreement on that point, and both agree that they should sit in the Security Council as a permanent member. One fundamental point divides us: whether to retain or to expel the Republic of China.

I submit that the course of expulsion, first, is most ill advised and dangerous as a precedent in the U.N., and second, simply is an unacceptable price to pay for the entry of the People's Republic of China into this organization. Let me give my reasons for both these points.

First, as to expulsion as a precedent: In the 26-year history of the U.N., no member has been expelled or deprived of its seat. Not one. In fact, the whole trend has been just the other way, so that the original 51-nation membership has grown now to 131, including an immense variety of sizes and political systems. Yet here it is proposed that a member in good standing, a government representing over 14 million people, served here by decent men, with no charter violations against its name and, on the contrary, with a most constructive record, should be expelled utterly from the United Nations and all its agencies, solely because certain other governments question its legitimacy.

* * * * *

If the Assembly is going to travel down that road, where do we stop? Who can predict what United Nations member could be next? Surely there is many another member in this organization which, though fully in possession of territory and government powers, could one day become the target of some political combination in these halls commanding a simple majority aiming to throw it out of the United Nations solely because its right to govern is disputed by others.

* * * * *

At this point, Mr. President, I would like to say a few words about universality. Much has been said from this podium on this subject. During the 25th anniversary session last year, two declarations were adopted

which endorsed the goal of universality. Many distinguished speakers in this year's general debate have reiterated their governments' dedication to this ideal. As we understand universality, Mr. President, it means the creation of circumstances whereby all peoples eventually can be represented in this world organization. We honestly do not see how the supporters of the Albanian resolution can logically invoke the principle of universality. Although they may question the legitimacy of the Republic of China, none of them contests the unblinkable fact that it is very much a reality. In our view, a vote for the Albanian resolution is a vote against universality. One nation coming in and one going out does not make this organization more universal.

* * * * *

The resolution neither says nor implies that there are "two Chinas" or "one China and one Taiwan." It does not attempt to prejudice the status of China or of future developments between the Republic of China and the People's Republic of China or of relations between them. It carefully closes no doors concerning future developments. It simply provides that, given the existing state of affairs, the People's Republic of China, which is not in the United Nations, should come in and should take over the Security Council seat and that the Republic of China, which *is* in, should remain in. The resolution does not, to be sure, accept the claims of the parties; but neither does it deny or reject or prejudice those claims. It is completely silent on them. Nothing consistent with the realities of the situation could be less prejudicial.

* * * * *

. . . [T]he expulsion of a member in good standing, which would result from the Albanian resolution, is simply unrealistic and certainly dangerous for the future of the United Nations. It is for this reason that the United States and its cosponsors have proposed a second resolution. . . .

* * * * *

In practical terms, our resolution would require that the Albanian resolution or any other resolution having the effect of depriving the Republic of China of representation must obtain a two-thirds majority in order to be adopted.

* * * * *

We are dealing in this important question resolution with the question of expulsion.

If you vote "yes" on the non-expulsion resolution you are voting against this insidious precedent of expulsion by a simple majority.

If you vote "no" on this resolution you in essence will be voting for expulsion—and in so doing you will, in our judgment and in the judgment of many members sitting out here today, be undermining the very foundation of the United Nations itself. The issue is just exactly that clear.

* * * * *

It is only logical and in keeping with United Nations practice that this procedural point should be settled before the voting on substantive pro-

posals. Accordingly, the United States delegation moves that the General Assembly vote first on the resolution contained in Document A/L.632.

(USUN Press Release No. 163, Oct. 18, 1971; reprinted at 65 Dept. of State Bulletin 548–552 (1971).)

STATEMENT BY AMBASSADOR BUSH IN PLENARY SESSION
OCTOBER 25, 1971

* * * * *

And now my fourth point: the question of legality. I am frankly surprised that some of the supporters of the Albanian resolution should have argued against our resolution on grounds of legality, of conformity with the charter and the rules of due process, and so on.

If there is a resolution before us which is arbitrary and which flies in the face of justice and due process—which are the real concern of the law—it is most certainly the Albanian resolution. No wonder it has been rejected so many times, year after year, by this Assembly. In total disregard of the charter it proposes to "expel"—that is the word, and that is the act it describes—to "expel" the Republic of China from the United Nations and all its organs without regard for the people concerned.

It would do so by a majority vote of this Assembly and without any reference to the law of the charter concerning expulsion. Where is due process here? Has anyone presented a shred of evidence that the Republic of China, in the words of article 6, has "persistently violated the Principles contained in the present Charter"? There is no such evidence. The Republic of China has no stain on its name here, no charter violation of any kind. It is a member in excellent standing.

* * * * *

The supporters of the Albanian resolution would have us believe that they propose to expel some amorphous group of people who represent no one at all. Presumably they are a group of private individuals who somehow have secured delegates' badges. Nothing could be further from the truth.

What the proponents of the Albanian resolution propose is the expulsion of the representatives of 14 million people. It should be clear to all in this room that if the Albanian resolution should pass in its present form, those people will be deprived of their only representation in the United Nations.

* * * * *

Some may ask where and when the charter has been used before in precisely the way our resolution proposes. The answer of course is: nowhere —because in 26 years the United Nations has never faced precisely this situation. But we have demonstrated in other actions that the charter is a flexible document. It was written by wise men to cope with the unforeseeable.

Within the charter's limits two members are present here that are governed by the Soviet Government in Moscow. Within its limits India, even before full independence, became a full voting member. Within its lim-

its Egypt and Syria joined, became one member, divided again, and resumed their separate seats. Within its limits two members, Tanganyika and Zanzibar, joined and became one. Within its limits Indonesia, having renounced its membership, after some years changed its mind and—amid general rejoicing—resumed its seat without any formality of readmission.

In every such case the United Nations has faced a reality, not a theory—and has acted accordingly, finding new solutions for new problems.

We are in a similar situation now. We face a reality, not a theory. Our proper concern must be to do justice to the complex reality that exists today in the form of effectively governing entities, and the charter gives us the room to innovate to satisfy that concern.

Finally, a word about the first proposition that will come before us in the voting: the resolution deciding that any proposal to exclude the Republic of China from the United Nations is an important question.

This non-expulsion resolution will have the effect of requiring that the Albanian resolution, which contains such an expulsion proposal, will fail unless it receives a two-thirds majority.

To decide such a question without a two-thirds majority vote would be unthinkable. The proposal to expel the Republic of China is, as I said at the outset of this statement, the heart of the matter before us. If it were to be adopted it would be the first expulsion of a member—by any procedure, legal or illegal—ever carried out in the history of the United Nations.

If this is not an important question, what is?

To take such a decision by a bare majority would expose this organization in future times to ill-considered attempts to railroad other members out of the United Nations as soon as a majority of members should decide—possibly on quite transitory and emotional grounds—that such and such a member does not truly represent its people or that some other group represents them better.

If members in this way, by a simple majority vote in this hall, could impugn before the world each other's legitimacy and each other's right to be called states, what a sore temptation that would be toward the promoting of instability and confusion in the United Nations and in the world. Such a development would inevitably raise new and grave questions in many countries as to whether the United Nations had become a cockpit for dissension rather than an instrument of peace.

Fellow delegates, the issue is clearly marked: inclusion or expulsion; impartiality or one-sided and arbitrary punishment.

If this is not an important question, what is?

* * * * *

(USUN Press Release No. 168, Oct. 25, 1971; reprinted at 65 Dept. of State Bulletin 552–555 (1971).)

STATE DEPARTMENT MEMORANDUM

The following memorandum on the subject of Chinese representation in the U.N. was prepared by the Department of State for Congressional use:

A question has been raised as to the legal basis for seating the People's Republic of China in the UN Security Council as one of the five permanent members of the Council.

It should be noted that the question of participation of the People's Republic of China in the UN does not involve the question of admission of a new member to the UN. China is already a member, and the question to be resolved is "How shall China be represented?" The proposal that both the People's Republic of China and the Republic of China be represented in the General Assembly, with the People's Republic of China seated as one of the five permanent members of the Security Council, would accord fully with existing realities and the objective of permitting all of the people on both sides of the Taiwan Strait to be effectively represented in the UN.

Since the General Assembly represents all the membership of the UN and is the UN's only completely representative body, it is entitled to state its opinion to the Security Council on the question of the Chinese seat in the Council. Indeed, some twenty years ago, in 1950, the General Assembly adopted Resolution 396 (V) which states that "in virtue of its composition" the General Assembly should consider questions concerning competing governmental claims of this character. While, under the Charter, the Security Council must of course finally determine questions concerning its composition and operations, it is perfectly clear that the members of the Security Council would pay the most serious attention to a General Assembly expression of opinion. Amendment of Article 23 of the Charter would not be required in order to seat the People's Republic of China as one of the five permanent members of the Council, since the right of representation of the People's Republic of China in the Security Council would be derivative from the status of the Republic of China as an original member of the UN dating from the entry into force of the UN Charter pursuant to Article 110 (para. 3) of the Charter.

September 29, 1971

(Reprinted at 117 Cong. Rec., Daily Edition, No. 148, p. H9296, Oct. 6, 1971.)

THE UNITED NATIONS

Maintenance of International Peace and Security: Obligations of Members; and *Trust, Non-Self-Governing, and Certain Other Territories: Southern Rhodesia* (13 Whiteman's *Digest*, Ch. XXXIX, §§ 2, 16)

On July 7, 1971, Assistant Secretary of State for African Affairs David D. Newsom made a statement [1] setting forth the position of the Executive Branch with respect to a then-proposed amendment to the U.N. Participation Act relating to U.S. enforcement of U.N. sanctions against Rhodesia. While that amendment was defeated, it was subsequently reintroduced and enacted as Section 503 of the Military Procurement Authorization Act, Public Law 92-156, 85 Stat. 423, approved November 17, 1971. That provision reads as follows:

[1] 65 Dept. of State Bulletin 111 (1971); excerpts reprinted at 66 A.J.I.L. 140 (1972).

"The Strategic and Critical Materials Stockpiling Act (60 Stat. 596; 50 U.S.C. 98–98h) is amended (1) by redesignating section 10 as section 11, and (2) by inserting after section 9 a new section 10 as follows: 'Section 10. Nothwithstanding any other provision of law, on and after January 1, 1972, the President may not prohibit or regulate the importation into the United States of any material determined to be strategic and critical pursuant to the provisions of this Act, if such material is the product of any foreign country or area not listed as a communist-designated country or area in general headnote (3)(d) of the Tariff Schedules of the U.S. (19 U.S.C. 1202), for so long as the importation into the United States of material of that kind which is the product of such communist-dominated countries or areas is not prohibited by any provision of law.'"

TREATIES AND OTHER INTERNATIONAL AGREEMENTS

Termination or Suspension: Effect of War on Treaties (14 Whiteman's *Digest*, Ch. XLII, §41)

See Aviation: Public Air Law: Crimes on Board Aircraft, above.

JUDICIAL DECISIONS

ALONA E. EVANS

Sovereign immunity—restrictive theory—waiver of immunity—effect of Department of State recommendation

ISBRANDTSEN TANKERS, INC. *v.* PRESIDENT OF INDIA. 446 F.2d 1198. U.S. Court of Appeals, 2nd Circuit, July 27, 1971. Certiorari denied, Dec. 7, 1971. 404 U.S. 985.

Plaintiff, a shipowner, entered into a charter party with defendant for the purpose of transporting grain to India in order to alleviate famine conditions resulting from droughts in 1965 and 1966. Plaintiff sued for damages for losses allegedly caused by unreasonable delays in the process of unloading plaintiff's ships at the port of Calcutta. Defendant pleaded sovereign immunity, and the Department of State advised the court to recognize such immunity. Plaintiff argued, however, that defendant had specifically waived immunity in accepting a clause of the charter party which provided:

> Any and all differences and disputes arising under this Charter Party are to be determined by the U.S. Courts for the Southern District of New York, but this does not preclude a party from pursuing any *in rem* proceedings in another jurisdiction or from submission by mutual agreement of any differences or disputes to arbitration. (446 F.2d 1198, at 1199. Footnote by court. Other footnotes omitted.)

Plaintiff further contended that defendant's appearance by answering the complaint constituted a waiver of immunity. The District Court dismissed the complaint. The Court of Appeals affirmed this judgment.

Circuit Judge Smith said:

> Whether or not these arguments possess logical force, in cases involving the governments of foreign powers the judiciary has candidly admitted that there exist interests beyond those of purely legal concern. A judicial decision against the government of a foreign nation could conceivably cause severe international repercussions, the full consequences of which the courts are in no position to predict. As this court noted in *Victory Transport, Inc. v. Comisaria General,* 336 F.2d 354, 358 (2d Cir. 1964), *cert. denied,* 381 U. S. 934 (1965) [59 A.J.I.L. 388 (1965)], "[i]n delineating the scope of a doctrine designed to avert possible embarrassment to the conduct of our foreign relations, the courts have quite naturally deferred to the policy pronouncements of the State Department." See also, *National City Bank of New York v. Republic of China,* 348 U.S. 356, 360–361 (1955) [49 A.J.I.L. 405 (1955)].
>
> Appellant emphasizes that traditionally, sovereign immunity has been afforded to foreign governments only in regard to actions of a public, as opposed to a private/commercial, nature. Here, it is contended, the actions of the Indian government were wholly concerned with a commercial purchase of grain, and therefore do not concern matters of

public policy or governmental discretion. This argument is premised upon the famed letter of Jack B. Tate, Acting Legal Advisor to the State Department, to Philip B. Perlman, Acting Attorney General, dated May 19, 1952 [appearing in 26 State Dept. Bull. 984 (1952)], indicating that it was the policy of our government to adopt the restrictive theory of sovereign immunity, i.e. to grant immunity to acts of a public nature, and to deny it to those of a private nature.

This proposed distinction between acts which are *jure imperii* (which are to be afforded immunity) and those which are *jure gestionis* (which are not), has never been adequately defined, and in fact has been viewed as unworkable by many commentators. In *Victory Transport*, this court adopted the view that acts which are *jure imperii* would be limited to the following:

(1) internal administrative acts, such as expulsion of an alien;
(2) legislative acts, such as nationalization;
(3) acts concerning the armed forces;
(4) acts concerning diplomatic activity;
(5) public loans.

336 F.2d at 360.

Were we required to apply this distinction, as defined, to the facts of the present case, we might well find that the actions of the Indian government were, as appellant contends, purely private commercial decisions.

It is true that the mere fact that a contract with a private commercial interest is involved does not automatically render the acts of the foreign government private and commercial. As this court recently noted:

> The view that all contracts, regardless of their purpose, should be deemed "private" or "commercial" acts would lead to the conclusion that a contract by a foreign government for the purchase of bullets for its army or for the erection of fortifications do not constitute sovereign acts—a result we viewed as "rather astonishing" in *Victory Transport*, 336 F.2d at 359. [*Heaney* v. *The Government of Spain*, 445 F.2d 501 (2d Cir., July 2, 1971)] [66 A.J.I.L. 189 (1972).]

In *Victory Transport*, the contract was, as here, for the carriage of grain, and in the absence of State Department action, jurisdiction was upheld. See also, *Petrol Shipping* v. *Kingdom of Greece*, 360 F.2d 103 (2d Cir. 1966) [60 A.J.I.L. 859 (1966)].

In situations where the State Department has given a formal recommendation, however, the courts need not reach questions of this type. The State Department is to make this determination, in light of the potential consequences to our own international position. Hence once the State Department has ruled in a matter of this nature, the judiciary will not interfere. See *Republic of Mexico* v. *Hoffman*, 324 U.S. 30, 35 (1945) [39 A.J.I.L. 585 (1945)].

Appellant attempts to distinguish the precedents in this area by noting that in none of them had the foreign sovereign contracted to waive its immunity. It is true that in situations where the Executive Branch has made no formal recommendation a foreign sovereign may be held to have waived its immunity. In *National City Bank of New York* v. *Republic of China*, *supra*, at 364, for example, the Supreme Court held that where a sovereign has itself brought suit, it is not immune from a counterclaim arising out of the same subject matter as the suit itself.

> In that same opinion, however, the Court noted that "[t]he status of the Republic of China in our courts is a matter for determination by the Executive and is outside the competence of this Court." 348 U.S. at 358.
>
> The potential harm or embarrassment resulting to our government from a judicial finding of jurisdiction, in the face of an Executive recommendation to the contrary, may be just as severe where the foreign sovereign had initially contracted to waive its claim of sovereign immunity as where it had not done so. Though we sympathize with appellant because of the difficult position in which such a holding places it, we have no alternative but to accept the recommendation of the State Department. (446 F.2d 1198, 1199–1201.)

Jurisdiction—extraterritorial effect of law—Cuban currency control law

JOHANSEN *v.* CONFEDERATION LIFE ASSOCIATION. 447 F.2d 175.
U.S. Court of Appeals, 2nd Circuit, June 17, 1971.

Plaintiffs brought an action against Confederation Life Association, a Canadian company with branch offices in the United States, Cuba, and twenty-one other countries, to compel defendant to pay them the proceeds of two $25,000 life insurance policies in United States currency; one of them also sought a judgment declaring that defendant must accept his premium payments on a life insurance policy in United States currency and must guarantee to pay the proceeds of said policy to his beneficiary in United States currency. The original owner of the first two policies, a United States national, had resided in Cuba from 1911 to 1959 but had returned frequently to the United States for business purposes and had maintained a summer residence in New York for more than twenty years. The owner of the third policy, who was also a beneficiary of one of the other two, was a United States national who had resided in Cuba from 1946 to 1960 but had returned to the United States for business purposes from time to time and had maintained a summer residence in New York from 1952 to 1960.

The first two policies were issued in Cuba in 1937 and 1939, respectively; the third was issued in Cuba in 1946. All three policies provided for payment or receipt of sums due at Havana in "lawful currency of the United States of America." (447 F.2d 175, 177.) With regard to this latter provision, it was shown that between 1914 and 1939 both United States and Cuban currency were legal tender in Cuba. A currency control law enacted in 1939, however, made the dollar and the peso interchangeable, so that debtors could elect to pay their obligations in one or the other currency. A decree adopted in 1951 made the peso the only legal tender in Cuba and set the exchange rate at one peso for one dollar, thereby converting dollar contracts into peso contracts. The defendant notified all policyholders in Cuba that it would meet its obligations henceforth in pesos. Neither of the original policyholders objected to this development, and both paid their premiums in pesos thereafter. A law enacted in 1959 made ownership of dollars a criminal offense and required the exchange of dollars for pesos on a one-to-one basis. The steady decline of the dollar exchange value of the

peso thereafter led plaintiffs, who had fled Cuba after Castro came to power, to demand conversion into dollars of the obligations accruing under the policies and payment in New York where they now resided. Defendant, on the other hand, was only prepared to meet its obligations under the terms of the original contracts because it had invested all funds received from its Cuban policyholders in Cuban assets for the purpose of meeting these Cuban obligations. Payment of such obligations in New York in United States currency as demanded by plaintiffs would leave defendant with Cuban peso reserves for which it would have no other use.

The main problem was to determine whether Cuban, New York, or Canadian law applied to the point at issue in this action. As this was a diversity of citizenship action (28 U.S.C. §1332), the District Court was bound to apply New York conflict of laws rules (*Klaxon Co.* v. *Stentor Electrical Mfg. Co.*, 313 U.S. 487 (1941), cited by court, *ibid.* 178). The District Court held that Cuban law applied and that the contract must be performed in Cuba and in pesos (312 F. Supp. 1056 (S.D.N.Y., 1970)). The Court of Appeals affirmed this decision.

On appeal, plaintiffs argued that according to the "greatest interest" theory of conflicts (*Miller* v. *Miller*, 22 N.Y.2d 12, 15–16, 290 N.Y.S. 2d 734, 737, 237 N.E.2d 877, 880 (1968), cited by court, 447 F.2d 175, 178), the domicile of the parties seeking to recover on the contracts must govern the award and as they had always been and were currently domiciled in New York, notwithstanding their Cuban residence, the contracts must be performed in accordance with New York law which would require payment in United States currency as the terms of the contracts had originally stated. They also pointed out that Canadian law was applicable here because Canada had an interest in the activities of companies domiciled here. In this connection, plaintiffs invoked *Imperial Life Assurance Co. of Canada* v. *Casteleiro y Colmenares* ([1967] Sup.Ct.Rep. 443, cited by court, *ibid.* 179), in which the Canadian Supreme Court held that Canadian law governed a policy issued by a Canadian company to a Cuban national who resided in Cuba prior to the coming of Castro and that the policy was payable in dollars.

Defendants contended that, according to traditional conflicts theory and the "center of gravity" or "grouping of contacts" theory (*Auten* v. *Auten*, 308 N.Y. 155, 124 N.E.2d 99 (1954), cited by court, *ibid.* 178), Cuban law governed the issue, so that payment must be made in Cuba and in pesos.

Chief Judge Lumbard took the view that the weight of the evidence pointed to the conclusion that the original policyholders had been domiciled in Cuba and had considered themselves permanent residents of that country until the advent of Castro. The policies had been subject to Cuban law from the time of issuance. Moreover, plaintiffs had not offered any objection to defendant's notice to them in 1951 regarding future payment of the policies in pesos. The court concluded:

> Thus, we hold that under either the "grouping of contacts" test or the test propounded by plaintiffs, Cuban law governs the disposition of

> this case; and under Cuban law, defendant's obligation on these policies is to pay in pesos, since the 1951 Cuban law forbade defendant to pay in dollars and changed the contracts in question here from dollar contracts to peso contracts. (*Ibid.* 180.)

Chief Judge Lumbard agreed with the District Court that there was no real conflict of laws issue here because enforcement of the Cuban law "would not violate New York public policy" (citing 312 F.Supp. 1056 at 1063, where the District Court relied upon *Dougherty* v. *Equitable Life Assurance Society of the United States*, 266 N.Y. 71, 193 N.E. 897 (1934) and *French* v. *Banco Nacional de Cuba*, 23 N.Y.2d 46, 295 N.Y.S.2d 433, 242 N.E.2d 704 (1968) [63 A.J.I.L. 640 (1969)]). The act of state doctrine was not germane to the discussion because no judgment was being made by a United States court as to the validity of the foreign law. Although plaintiffs had a point in their contention that defendant's "sales pitch" had assured American nationals in Cuba that the policies would be honored in the United States should the insureds move back to this country and that defendant had done so in some instances, the court agreed with the District Court that plaintiffs were estopped from raising this issue now because they had not approached the defendant on the matter until after the change in regime had barred defendant's transfer of assets to New York. Following this line of reasoning, Chief Judge Lumbard concluded that the "'equities' of the situation . . . tip the scale slightly in the defendant's favor." (447 F.2d 175, 181.) He observed that the District Court took this position because "defendant is a mutual company and all its policyholders may be affected if it must pay policies such as these in dollars." (*Ibid.* 182.) The Court of Appeals concluded:

> It seems to us . . . that the company's policy of investing in the country where the insured lived was a reasonable and almost necessary business decision, especially where, as here, the policy expressly provided for payment in that country. Thus, the company would not be unjustly enriched by being allowed to pay in pesos, whereas requiring it to pay in dollars would in effect be compelling it to pay twice and thereby put a burden on its general uncommitted reserves. (*Ibid.*)

Circuit Judge Smith, concurring, based his views on the failure of plaintiffs to challenge the 1951 conversion of the policies from dollar contracts to peso contracts.

Circuit Judge Feinberg in a lengthy dissent took issue with the majority's holding, saying *inter alia:*

> That the defendant can no longer transfer its assets out of Cuba does not require affirmance of the district court order. Defendant's obligation to plaintiffs is a general one, payable from defendant's general assets. Defendant's unannounced policy of investing in Cuban assets enough funds to cover payment of its Cuban policies is irrelevant to its obligation to plaintiffs. On their face, there is no indication that the policies are restricted to assets held in Cuba. While perhaps it was a reasonable business practice to invest in Cuban assets, no Cuban law required defendant to do so. (*Ibid.* 186.)

Act of state doctrine—confiscation of contractual rights against American insurers—Cuba

OLIVA *v.* PAN AMERICAN LIFE INSURANCE CO. AND AETNA INSURANCE CO. 448 F.2d 217.

U.S. Court of Appeals, 5th Circuit, June 22, 1971. Rehearing denied, July 13, 1971.

Plaintiff, a Cuban national who had taken refuge in the United States, brought an action to recover on life and fire insurance policies which he had purchased in Cuba from defendants, a Louisiana corporation and a Connecticut corporation, respectively, and which had subsequently been confiscated by the Castro government. The life insurance policy, which was issued by the Louisiana defendant in 1945, provided for payments in United States currency. The Cuban Government promulgated a decree in 1951 which converted dollar obligations into peso obligations. Defendant then notified its policyholders that they could elect to pay premiums in dollars in New Orleans or in pesos in Cuba. Plaintiff chose the second option whereby payments would be "on the basis of one Peso for every Dollar payable under the contract. . . ." (448 F.2d 217, 219.) In April, 1959, the Cuban Government ordered the confiscation of plaintiff's property. Thereafter, plaintiff made several efforts to transform the policy from pesos to dollars. The Louisiana defendant would agree only to pay the cash surrender value of the policy in pesos in Cuba but with the understanding that plaintiff could then apply for reinstatement of the policy in the United States in dollars within a fixed period. Plaintiff sued for the cash surrender value in a Florida court in August, 1960. Just after the case was removed to Federal court, the defendant paid the cash surrender value of the confiscated life insurance policy to the Cuban Government, which then absolved defendant from further liability on the contract.

The Connecticut defendant had issued a fire insurance policy in 1952 to plaintiff on certain business property in Cuba. Part of this property was destroyed in 1958, but no settlement had been reached with defendant before the Castro government came into power. Thereafter, the Cuban Government expropriated plaintiff's claim against this defendant by selling some of defendant's securities in Cuba and retaining the assets. Subsequently, the Cuban Government also absolved this defendant from further liability on the fire insurance contract. Plaintiff's claims against the two defendants were dismissed in 1961 on the doctrine of *forum non conveniens.* On appeal, these decisions were reversed and remanded. (*Rodriguez* v. *Pan American Life Ins. Co.,* 311 F.2d 429 (5th Cir., 1962; *Menendez* v. *Aetna Ins. Co.,* 311 F.2d 437 (5th Cir., 1962), cited by court, *ibid.* 218.) The Supreme Court granted certiorari, vacated the judgment of the Court of Appeals, and remanded the now consolidated cases for "further consideration in the light of Banco Nacional de Cuba v. Sabbatino" (376 U.S. 398 (1964) [58 A.J.I.L. 779 (1964)], 376 U.S. 779 (1964) [59 A.J.I.L. 160 (1965)], cited by court, *ibid.*). The Court of Appeals re-

remanded the case to the District Court (*Rodriguez* v. *Aetna Ins. Co.*, 340 F.2d 708 (5th Cir., 1965), cited by court, *ibid.*), which granted summary judgment to plaintiff on both claims. On appeal this judgment was affirmed in part and reversed in part.

Chief Judge Brown found that the instant cases were governed by the rule of *Pan American Life Insurance Co.* v. *Blanco* (362 F.2d 167 (5th Cir., 1966) [61 A.J.I.L. 211 (1967)], cited by court, *ibid.* 220), in which it was held that recovery on an attempted expropriation of contractual rights was not precluded by the act of state doctrine (362 F.2d 167, 170, cited by court, *ibid.*). The court agreed with the District Court that plaintiff was not entitled to a cash surrender value of the life insurance policy on a one-for-one basis but rather at the dollar exchange rate for the peso at the time he presented his demand to the Louisiana defendant. The court reversed the lower court's award of attorney's fees to plaintiff.

Jurisdiction—Status of Forces Agreement with Philippines, 1947—primary jurisdiction—obligation to return accused serviceman to Philippines for trial—extradition—necessity of treaty or Federal law for extradition from United States—whether Status of Forces Agreement meets this requirement

WILLIAMS *v.* ROGERS. 449 F.2d 513.
U.S. Court of Appeals, 8th Circuit, Sept. 28, 1971.

Plaintiff, an enlisted member of the United States Air Force, sought to enjoin the Secretary of State and other government officials from reassigning him to the Philippines where he would stand trial with two other servicemen on a charge of forcible abduction and attempted rape of a Philippine national. The facts of the case were not at issue. In 1969, while plaintiff was being held in custody by the Air Force at the request of Philippine authorities pending trial, he was transferred to the United States. This transfer directly violated Article XIII(5) of the 1947 Agreement Concerning Military Bases between the United States and the Philippines (61 Stat. 4019, T.I.A.S., No. 1775, 43 U.N. Treaty Series 271, as amended by an exchange of notes in 1965, 16 U.S. Treaties 1090, T.I.A.S. No. 5851, 564 U.N. Treaty Series 208). The record showed that the transfer had resulted from the failure of authorities at Clark Air Base in the Philippines to notify Air Force authorities in Virginia that plaintiff was being held on criminal charges, so that his transfer would have to be deferred pending the outcome of his trial. On learning of the transfer, Philippine authorities had sent a strong protest to the American Embassy at Manila, and the Court of First Instance had issued a contempt citation to the Commander of Clark Air Base and to the Chief of the International Law Section thereof to whose custody plaintiff had been entrusted. Plaintiff contended that his reassignment to the Philippines would not only constitute an illegal transfer but would also amount to illegal extradition in violation of his civil rights, privileges, and immunities as guaranteed by the Constitution and Federal laws.

In 1970 a preliminary injunction was issued to stay plaintiff's transfer pending a determination on the merits. In February, 1971, defendants moved for summary judgment. In May the District Court granted this motion, finding that plaintiff could properly be returned to the Philippines. The Court of Appeals affirmed this judgment.

At the outset, Circuit Judge Stephenson was concerned about the basis of the court's jurisdiction. Plaintiff's cause of action was apparently based upon 42 U.S.C. §1983, which, if found to provide grounds for a claim here, would confer original jurisdiction on the District Court (28 U.S.C. §1343). Pointing out that the thrust of §1983 was to a charge of wrongdoing by State officials rather than by Federal officials, Judge Stephenson took the view that the complaint should have been raised under 28 U.S.C. §2241(c)(3), which enabled a District Court to issue a writ of habeas corpus to a person within its jurisdiction for the purpose of testing the validity of his detention. As plaintiff was under restraint in the United States and would be so in the Philippines, the court had subject-matter jurisdiction under §2241(c)(3).

Turning to the merits, plaintiff was essentially challenging the right of the Air Force to correct a mistake where such correction would constitute his extradition to a country with which the United States had no extradition treaty and in which allegedly he would not receive due process of law in its criminal proceedings. In any event, he contended that he should have a probable cause hearing before being returned to the Philippines. The defendants argued that the 1947 Agreement sufficed to cover plaintiff's situation. Judge Stephenson said:

> Article XIII, as amended, is an integral provision of the Agreement. It provides specific jurisdictional and procedural guidelines for the arrest, trial and custody of American Armed Forces personnel accused of committing criminal offenses on Philippine soil. Agreements with features of the kind involved here are by no means novel and we have no difficulty in concluding that this one represents a valid and appropriate exercise of legislative and executive authority.
>
> We recognize, and, of course, we must follow, the still live holding of the Supreme Court in the case, Valentine v. United States ex rel. B. Coles Neidecker, 299 U.S. 5, 57 S.Ct. 100, 81 L.Ed. 5 (1936), that the executive possesses no power to extradite fugitive criminals except such as is conferred by treaty or by Act of Congress. . . .
>
> *Valentine* is said by Sergeant Williams to provide the framework within which the principal issue of the present case must be resolved. But, it seems clear to us that the holding there requires only that there be a showing of some authority, whether in the form of congressional dictate or policy, or the provisions of an existing treaty, to provide a legitimate basis for the surrender of fugitives from justice by this country to another. Our question here, then, is whether the Agreement, resting as it does on the delegation of legislative authority, could provide such a basis.
>
> It is our view that the Military Bases in the Philippines Agreement of 1947, as later amended in 1965 meets the fiat of *Valentine,* insofar as applicable here, and that it authorizes and compels the prompt return of Sergeant Williams to the Philippines. We note that the Joint Resolution giving rise to the Agreement entrusted the President

> with broad powers to withhold, acquire and retain such military bases as he deemed necessary for the mutual protection of this country and the Philippines. We regard the authority to negotiate criminal jurisdiction arrangements as being necessarily implicit in such an expansive delegation of authority. And, we think that once the President is properly found to possess the power to negotiate jurisdictional arrangements of the sort present here, it is not impermissible also to find that he has the correlative power to enforce the obligations of our servicemen undertaken pursuant thereto. We emphasize, also: (a) The obvious interest of the military in securing the custody of those of its personnel who are charged with the commission of crimes by Philippine authorities pending their trial; (b) The impact and adverse effect that an open and well-publicized breach of the solemn obligations imposed on commanding officers by the custodial provisions of Article XIII has upon the reputation and integrity of American Servicemen stationed in the Philippines and upon the military mission and purposes of our bases there; (c) Our conviction that custodial provisions of the kind involved here can have present and future meaning and significance only if Armed Forces supervisory personnel are deemed to possess the power to correct administrative errors of the kind that occurred here; (d) Our feeling that the benefit to Sergeant Williams in being permitted to remain on base and in American custody pending the final disposition of the Philippine proceedings against him produced a concomitant obligation to report and appear when required to do so and to remain responsive to the curative orders of superior officers if, as here, a mistake should occur through inadvertence and oversight. (449 F.2d 513, 520–522.)

The court concluded that there was no reason to question Philippine judicial processes. As for plaintiff's request for a probable cause hearing, the court said:

> We note that he is being returned pursuant to a special agreement which neither imposes nor contemplates such a requirement. In the absence of such a requirement, the wisdom of the agreement and the details thereof are matters exclusively within the domain of the Executive and Legislative Branches. (*Ibid.* 522–523, citing *Wilson* v. *Girard*, 354 U.S. 524, 530 (1957) [51 A.J.I.L. 794 (1957).]

District Judge Neville, concurring, took exception to the majority's holding as to the jurisdiction of the District Court, arguing that 28 U.S.C. §1391(e) satisfied the situation so that there was no need to "analogize the case to a writ of habeas corpus." (*Ibid.* 523.)

Aliens—Foreign Assets Control Regulations—People's Republic of China

CHENG YIH-CHUN *v.* FEDERAL RESERVE BANK OF NEW YORK. 442 F.2d 460.

U.S. Court of Appeals, 2nd Circuit, April 28, 1971.

Plaintiff sought a judgment that his interest as heir to some $62,000 on deposit in a New York bank was not subject to the Foreign Assets Control Regulations which were issued on December 17, 1950, in pursuance

of §5(b) of the Trading With the Enemy Act (31 C.F.R. §§500.101 *et seq.*; 50 U.S.C.App. §5(b); cited by the court, 442 F.2d 460, 462), or, in the alternative, that the Secretary of the Treasury should be ordered to issue a license transferring these funds to plaintiff. The funds which had belonged to plaintiff's father were divided, after his death in 1949, among six heirs, five of whom lived in Shanghai while plaintiff lived in Hong Kong. As of December 17, 1950, China was listed as a "designated country" under the Foreign Assets Control Regulations, and transactions involving property of Chinese nationals subject to United States jurisdiction were "frozen" subject to release by license from the Secretary of the Treasury. As plaintiff resided in Hong Kong, his share of the estate was not affected by this regulation. In April, 1950, plaintiff and his Chinese relatives executed a "Power of Attorney" before the British Vice Consul in Shanghai which authorized plaintiff to represent the interests of the five Chinese heirs in decedent's New York estate. In November and December, 1963, plaintiff and the Chinese heirs exchanged letters in which the latter released their interests in the New York estate in return for plaintiff's release of his interest in decedent's Shanghai estate. As this arrangement followed the freezing date and had not been licensed by the Secretary of the Treasury, it did not effect a transfer to plaintiff of the Chinese heirs' interests in the New York estate.

In 1959 plaintiff withdrew his one-sixth distributive interest in the New York estate. His efforts to obtain a license from the Treasury Department enabling him to have access to the other five-sixths were denied on the ground that there was inadequate proof of the pre-freezing transfer of the Chinese heirs' interests to plaintiff. In 1936 the New York Surrogate's Court held that the April, 1950, power of attorney was valid and ordered the remaining funds placed at plaintiff's disposal, subject, however, to his obtaining a Treasury Department license. This license was denied as before for want of adequate proof of the 1963 transfer. In the present action, defendants moved for summary judgment. The District Court granted this motion. The Court of Appeals affirmed this decision.

Plaintiff's first contention was that the Secretary of the Treasury was bound by the decision of the New York Surrogate's Court as to ownership of property within its jurisdiction. Circuit Judge Friendly pointed out, however, that, although the Federal court was bound to follow the highest State court's, or in the absence thereof, other State courts' interpretation of an issue of State law (citing *C.I.R.* v. *Estate of Bosch*, 387 U.S. 456 (1967), *ibid.* 463), New York practice indicated that the April, 1950, power of attorney would not be recognized in New York as having the effect of transferring the beneficial interests of the appointing parties to the appointee. Moreover, the terms of the 1963 exchange of letters indicated that the 1950 document was not intended to effect such a transfer.

Among other arguments, plaintiff urged that the Secretary of the Treasury had been arbitrary and capricious in denying his applications for release of the funds on the basis of the 1963 exchange of letters and that the Secretary was thereby denying hard currency to nationals of blocked

countries. The Secretary replied, however, that the purpose of the Trading With the Enemy Act was to protect such assets for possible use in the future settlement of claims by United States nationals against such blocked countries (citing, inter alia, *Nielsen* v. *Secretary of the Treasury*, 424 F.2d 833, 840 (D.C.Cir., 1970) [64 A.J.I.L. 951 (1970)]). Plaintiff also attempted to invoke *Nielsen* as support for his contention that, by denying him the license, the Secretary had deprived plaintiff of his property without due process of law. Judge Friendly observed that *Nielsen* had upheld the constitutionality of the Cuban Assets Control Regulations at issue in that case. Furthermore, there was no doubt that the funds in controversy here belonged to the Chinese heirs. Plaintiff's argument that he ought to be allowed to draw $100 per month from the blocked account under the terms of 31 C.F.R. §500.521 had no validity, in the court's opinion, because the beneficial interests at issue were not held by the payee or members of his household.

Jurisdiction—Constitutional limitations on court-martial jurisdiction not applicable to courts-martial held abroad—NATO Status of Forces Agreement, 1951—Federal Republic of Germany

HEMPHILL *v.* MOSELEY. 443 F.2d 322.
U.S. Court of Appeals, 10th Circuit, April 13, 1971.

In a habeas corpus proceeding, petitioner, a military prisoner, contended that a United States military court sitting in the Federal Republic of Germany did not have jurisdiction to try him on a charge of assault with intent to commit rape because this was a non-military offense which had taken place while he was on leave from his base. The District Court denied the petition (313 F.Supp. 144 (D. Kansas, 1970), cited by court, 443 F.2d 322, 323) on the grounds that the rule of *O'Callahan* v. *Parker* (395 U.S. 258 (1969), cited by court, *ibid.*) did not apply to an offense committed in a foreign country and that petitioner had not exhausted his military remedies. The Court of Appeals affirmed this decision.

Because petitioner questioned the right of a military court to try him, Circuit Judge Hill decided to consider whether *O'Callahan* was applicable to the instant case. He said:

> When a crime occurs on foreign soil, United States civilian courts are generally not available to vouchsafe the rights of the accused. *See* Gallagher v. United States, 423 F.2d 1371, 1374 (Ct.Cl. 1970) [64 A.J.I.L. 959 (1970)]. In the first place, with few exceptions, the federal criminal statutes do not apply to extraterritorial acts and thus they are not "offenses against the United States" over which the federal district courts have jurisdiction. Bell v. Clark, 308 F.Supp. 384, 388 (E.D. Va. 1970); United States v. Keaton, 19 USCMA 64, 41 C.M.R. 64 (1969) [64 A.J.I.L. 431 (1970)]. And in addition to the problematical jurisdiction issue, the question of where venue would lie is an imposing and unanswered query. In short, we conclude that military jurisdiction over crimes committed by servicemen in foreign countries is left untouched by O'Callahan. (443 F.2d 322, 323–324.)

International tax liability—deduction of payments to head of foreign government as business expenses—Federal income tax law

UNITED STATES *v.* REXACH. 331 F.Supp. 524.
U.S. District Court, Puerto Rico, March 26, 1971.

The United States brought an action to foreclose liens on certain stock, a debt, and land belonging to defendant for income taxes, interest, and penalties assessed against defendant for the years 1959 and 1961 in the amount of $2,934,098.57. Defendant, an American national residing in Puerto Rico, was a licensed engineer who specialized in harbor works.

In 1958 plaintiff began an action to foreclose liens on the same stock, debt, and land for taxes due on income received by defendant pursuant to construction contracts with the Government of the Dominican Republic between 1951 and 1956, amounting to $2,354,478.48 including interest, fraud, and other penalties. This claim was settled in 1962 by defendant's payment of $76,866.01 in taxes and interest but without penalties (*United States* v. *Rexach*, 185 F.Supp 465 (D.P.R., 1962), cited by court, 331 F. Supp. 524, 529). Defendant filed income tax returns for 1957 and part of 1958 after which he became a naturalized citizen of the Dominican Republic, allegedly under pressure, which status ended in 1962 when he resumed his American nationality (see *Benitez Rexach* v. *United States*, 390 F.2d 631 (1st Cir., 1968) [63 A.J.I.L. 140 (1969)]). In 1962 defendant's properties in the Dominican Republic were seized by the Government and placed under the control of a "sequestrator." They were returned to him in 1966 but without provision for compensation for damage thereto or use thereof, defendant's only recourse being a claim through the diplomatic channel. Between 1960 and 1964 plaintiff brought a series of actions charging defendant with failure to pay full taxes due on his income and with fraudulent concealment of records of costs and fraudulent statements as to expenditures. These actions were dismissed on various grounds (*United States* v. *Rexach*, 200 F.Supp. 494 (D.P.R., 1961), *United States* v. *Rexach*, 41 F.D.R. 180 (D.P.R., 1966), cited by court, 331 F.Supp. 524, 529, 534).

In the present action, the Commissioner of Internal Revenue contended that defendant's profits on two contracts with the Dominican Government in 1959 amounted to 57½% of payments received, and he disallowed defendant's deduction of 33⅓% of this sum as business expenses, which sum defendant had paid to Rafael Trujillo, the absolute ruler of the country, in order to secure the contracts. The Commissioner argued that, according to §5(c) of the Technical Amendments Act of 1958 (Pub. Law 85-866), no deductions would be allowed after 1958 for "[i]mproper payments to officials or employees of a foreign government." (Quoted by court, *ibid.* 534.) It was shown, however, that defendant's obligation to make such payments to Trujillo arose before this Act went into effect. It was also clear that Trujillo did not qualify as an "official" or an "employee" of the Dominican Republic but rather that he constituted the government of the country. The Commissioner also disallowed one third of defendant's

deduction in 1961 on the same grounds, despite the fact that defendant did not make this claim in his return. Judge Cancio held that the payments to Trujillo were deductible business expenses in the circumstances of this case.

REPUBLIC OF PHILIPPINES CASE NOTE

Treaties—jurisdiction over military bases—Constitutionality of Military Base Agreement with United States, 1947—relationship of international law to municipal law—the law of the Philippines

GONZALES *v.* CLARK AIR BASE COMMANDER ET AL. Civil Case No. 79283. Court of First Instance of Manila, 6th Judicial District, Branch XI, Jan. 22, 1971. Certiorari denied by Supreme Court, March 18, 1971.*

In a taxpayer suit, plaintiff sought a judgment declaring that the terms of the Agreement Concerning Military Bases of March 14, 1947, between the Republic of the Philippines and the United States (61 Stat. 4019, T.I.A.S., No. 1775, 43 U.N. Treaty Series 271) were unconstitutional and void. Plaintiff contended that the Republic's commitment to relinquish jurisdiction over the military bases under the Agreement had the effect of diminishing the territorial jurisdiction of the Republic as that was defined in Article I of the Constitution, a change which could only be brought about by Constitutional amendment, not by treaty. The Agreement not only delimited United States rights in certain military bases but also authorized the admission of military personnel and related civilian components and provided for exemptions from customs duties, income and other taxes for persons and property connected with said bases. The Agreement also defined the criminal jurisdiction of the two governments over military personnel attached to the bases. All defendants named in the complaint except the Commander of the Clark Air Base moved to dismiss on the ground that plaintiff lacked standing to sue and that he had failed to state a claim upon which relief could be granted. The Secretary of Foreign Affairs notified the court that a statement had been received from the American Embassy to the effect that the Clark Air Base Commander was precluded from appearing because the complaint concerned an internal matter. It was also shown that plaintiff had filed a petition for a writ of mandamus against the defendants, excepting the Clark Air Base Commander, with the Supreme Court, which had dismissed it on the ground that no cause of action had been stated. The Court of First Instance dismissed the present complaint.

The first question before the court was whether plaintiff had standing to bring the suit. Referring to Philippine and United States precedents, Judge Coquia said:

> A person who questions the validity of a statute or law must show that he has sustained, or is in immediate danger of sustaining some

* Text of decision made available by Judge Jorge R. Coquia, Executive Secretary, Philippine Society of International Law.

> direct injury as a result of its enforcement. (Civil Case No. 79283, p. 3.)

In his opinion plaintiff did not meet these requirements.

The court then considered the issue of whether the case was *res judicata* as a result of the Supreme Court's dismissal of plaintiff's petition for mandamus. Judge Coquia decided this question in the affirmative.

With regard to the merits of the case, Judge Coquia said:

> This Court is not unmindful of previous rulings of the Supreme Court on the same issues. In the case of Raquiza vs. Bradford, 75 Phil. 50, and Tubbs vs. Griess, 78 Phil. 249, the Supreme Court has sustained the validity of the military bases agreement. The Supreme Court, in fact, in a third case (Dizon vs. Philippine Tyukus Command, 81 Phil. 291) sustained the International Law principle that a foreign State allowed to march through a foreign country and to be stationed in it by permission of its government is exempt from civil and criminal jurisdiction of the place. It was likewise held that the exemption from criminal and civil jurisdiction was not a constitutional diminution of jurisdiction, or a deprivation thereof. (*Ibid.* 4–5.)

As a subordinate court, the Court of First Instance lacked authority to overrule these decisions of the Supreme Court. Judge Coquia concluded:

> Lastly, this Court is not unmindful of the international obligations of the Republic of the Philippines and the principle of the supremacy of international obligations over national law has found repeated expression in international law jurisprudence. Thus, in the Advisory Opinion No. 17 (Greece and Bulgaria Communities' Case), the Permanent Court of International Justice held that "it is a generally accepted principle of international law that in the relations between Powers who are contracting parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty" (P.C.I.J. Pub. Ser. B, No. 17, p. 32). In another advisory opinion (Treatment of Polish Nationals in Danzig) the same court laid [down] a decision that a State cannot adduce against another State its own constitution in order to evade obligations incumbent upon it under International Law (P.C.I.J., Pub. Ser. A/B No. 44; see also, Aroa Mines Ltd., Ralston's Report, p. 344). (*Ibid.* 5–6.)

BOOK REVIEWS AND NOTES

LEO GROSS
Book Review Editor

The Price of International Justice. By Judge Philip C. Jessup. New York and London: Columbia University Press, 1971. pp. xi, 82. $5.95.

As explained in the preface by Judge Jessup and in the foreword by Andrew Cordier, Columbia University, the volume is a reproduction of the substance of three lectures given by Judge Jessup at Columbia University in April and May, 1970.

The first Chapter, "The Rocky Road to International Justice," gives an historical résumé of five cases constituting the Rocky Road, namely, the *Alabama Claims* Arbitration and that of the *Alaskan Boundary* dispute, both between the United States and Great Britain; the *Temple of Preah Vihear* (*Cambodia* v. *Thailand*), the boundary dispute between Nicaragua and Honduras, and that between India and Pakistan, decided by the International Court of Justice.

One must agree with Judge Jessup that some of these cases marked a Rocky Road to International Justice, although in one of them he and I were at opposite poles—he of counsel for Nicaragua and I a member of the Court which decided against his client. I fully endorse his view on the efficacy of arbitration and court decisions in the settlement of international disputes without the intervention of an international sheriff or marshall (p. 21).

Chapter 2, "Who Will Pay the Price for Peace," relates largely to the reluctance of disputant states (with copious examples of refusal by one of the parties) to accept arbitration. In support of the judicial process, he draws upon the *Alabama Claims* settlement, adjudication of claims under the Jay Treaty, the settlement of the *Northwest Boundary* dispute under that treaty, the Treaty of Ghent, the Webster-Ashburton Treaty, the claims settlement with Great Britain under the Treaty of 1853, and the settlement under the Special Agreement of 1910. He discusses utilization of the Permanent Court of Arbitration, the Permanent Court of International Justice, and the International Court of Justice, arbitration of differences relating to the *Fur Seals in the Bering Sea,* the *Alaskan Boundary* dispute, the *North Atlantic Coast Fisheries,* etc., and raises the question as to why there has been no further cumulative settlement of claims with Great Britain since the 1910 Agreement.

I assume that Judge Jessup has not overlooked the Agreement of May 19, 1927, for the settlement of certain claims arising out of the European War,[1] some of which were settled by the judicial process.[2]

[1] 4 Treaties, etc. (Trenwith, 1938) 4256.

[2] VII Hackworth's Digest of International Law 190 *et seq.*

The third and last chapter, "The International Machinery of Justice," treats of a variety of topics, such as the adjudication of claims against Italy, Japan and Germany, following the second World War, cases coming before the Administrative Tribunals of the U.N., bilateral arbitrations between 1945 and 1956, judgments by the Court of Justice of the European Community and the Court of Human Rights, procedure by the International Labor Organization, composition and procedure of the International Court of Justice, possible use of the Chamber of Summary Procedure and other chambers which the Court is empowered to create and, lastly, a proposal that has been advanced for the greater use of the Court by reference to it of difficult questions of international law pending in national courts.

It is not possible in the limited space allotted to this short note adequately to comment upon these various subjects. Suffice it to say that this little book is a gem of interesting topics interestingly presented.

GREEN H. HACKWORTH

Foreign Relations of the United States. The Conferences at Washington and Quebec 1943. (Dept. of State Pub. 8552.) Washington, D. C.: U.S. Govt. Printing Office, 1970. pp. xcvii, 1382. Indexes. $7.00.

This is the first of a projected set of reviews of 15 volumes of *Foreign Relations* for the remaining World War II years and the 1945–46 post-hostilities period. For one who was involved at the "working level" in Washington, Havana, Mexico City, Madrid, London, Berlin, Vienna and Paris in those years as to some of the events covered, the experience of re-living formerly classified history is both eerie and fascinating, but, I hope, not so much so as to induce serious distortions in the reviewing process. The danger exists, though: I have felt impelled to comb these volumes, without success so far, for a note (handwritten) from President Roosevelt to Secretary Hull shown to me in 1945 when I wanted to accept a U.N. Charter assignment and my immediate superiors in the Department of State wanted me to work on reparations, restitution, looted gold, and eventually the Paris Peace Treaties. As I recall it, the note was to this effect:

> "Dear Cordell,
>
> I have always thought that one reason for the failure of the League, here and elsewhere, is that the Covenant was made an annex to the Treaty of Versailles. Judge, I do not want that to happen again! Please, therefore, see to it that you have one group of people to settle the war and another to work on the U.N. we must have to keep the peace in future.
>
> F. D. R."

That in *Foreign Relations* I shall find this internal communication is unlikely; and from this one notes a distortion probably based on editorial economic necessity: in general, it is only the papers that mark agreements

with other governments, that go to other governments or that are prepared as formal position papers for negotiations with other governments that are covered. It will be interesting for those who live to read, *circa* 1996, *Foreign Relations for 1971: Viet-Nam and Cambodia,* to see how much of the "old" Pentagon Papers of the early Seventies get included. There is one revealing and often delightful exception: the memoranda of conversations prepared by the American actors in the meetings, exchanges, conferences, and differences of the day. Some of these are irresistible, even if they are not of enduring structural significance.

Normally, however, I shall try to limit my appraisal to those documents and events that have a lasting importance for international law, international organizations, and related matters. The 1943 volume here reported on contains documentation on the fourth and fifth conferences participated in by President Roosevelt and Prime Minister Churchill after the United States became a belligerent in World War II. These are the Third Washington Conference of May, 1943 ("TRIDENT") and the First Quebec Conference ("QUADRANT"), the following August. The latter meeting was linked fore and aft to meetings at Hyde Park and Washington between the great principals.

Civilian and military advisers were present, particularly military staff leaders of both countries at the Combined Chiefs of Staff level; and the predominant concerns of the conferences were military.

There were also political discussions looking to the future, particularly at Quebec. Leaving the entirely military aspects to military and other historians, the contents of this volume in *Foreign Relations* include, *inter alia,* either prologues or preludes to (1) atomic energy, both for military and other purposes, (2) unconditional surrender, (3) post-hostilities peacekeeping in Central Europe, (4) the end of hostilities by Italy, (5) the core concept of the United Nations Organization, (6) Allied policy toward then pro-Axis but non-belligerent Spain, (7) Palestine, (8) postwar civil aviation policy, (9) O. S. S. intelligence activities in formerly British areas.

This is my selection of vignettes and documents for this volume:

The Washington Conference

1. *The British Embassy Memorandum on Regional Councils in Relationship to a World Council* (pp. 166–172), suggests the decision that F.D.R. ultimately had to make in favor of a universalistic, rather than a co-ordinator-of-regional-organizations, rôle for the United Nations, and beyond that, the Vandenberg Compromise (Article 51) and Chapter VIII issues, such as Guatemala, 1954: OAS or U.N.?

2. *Cordell Hull's Memorandum of Conversation with Mr. Churchill, May 13, 1943* (p. 49):

> . . . I brought up the need for a more full and complete understanding with Russia . . . [the need] through carefully selected persons to talk Mr. Stalin out of his shell, so to speak, away from his aloofness, secretiveness and suspiciousness until he broadened his views and visualized a more practical international cooperation in the future; at the

same time indicating Russia's intentions both in the East and the West. Mr. Churchill thought that Russia would help fight Japan when the war in the West was over, to which I replied that so far as I knew, there was no evidence or intimation of any kind as to what Russia would do in this respect; that it was my opinion that if she eventually should come into the war in the Pacific, it would probably be two or three weeks before victory, during which time she could spread out over Manchuria and other large areas. . . .

I then referred to our commercial policy and trade agreements program and elaborated on that in ways that are familiar to all . . . He said very little on this question. . . .

The Prime Minister said that he and Eden found de Gaulle terrible to get along with and that he wanted it understood that they were not undertaking to build him up . . . I said that there was nothing personal implied in my remarks but I wished to point out with emphasis the poisonous propaganda activities of the de Gaulle organization both in this country and in North Africa where the purpose seemed to be to undermine and break down support for Giraud and then for de Gaulle to take charge politically . . . and transplant this organization to Metropolitan France . . . I do not think I made any special impression on the Prime Minister in this regard. . . .

3. *Lt. General Stilwell's Memorandum of Conversation with Mr. Churchill, May 22, 1943* (p. 165):

He asked if I thought the British had been dilatory and lacked energy [in the C.B.I. theatre]. I said "Yes" . . .

In connection with Chinese policy, I told him that I thought CKS was trying to substitute American air power for Chinese ground troops . . . In my opinion, the Generalissimo will continue on this line, asking for more and more U. S. aviation, and letting the ground forces, except for certain units under his direct control, deteriorate beyond redemption by neglect, and that if it went any further, our progress in Yunnan would be lost, and that it would be practically impossible to re-establish it later . . .

The First Quebec Conference

1. *The Legal Adviser (Hackworth) to Mr. Hull on Rome as an "Open City," August 5, 1943* (pp. 557–559):

[Excerpts from a Memorandum that informs but does not prescribe.]

. . . We could, of course, say that by waiting until this late date, when the Italian military effort is disintegrating, the Italian Government has deprived itself of the right to have the city recognized as an undefended place, or we could state that the only conditions under which the Allied Governments will agree to refrain from bombing the war installations and facilities in the city is for Italy to agree to remove her war operations from the city and not to defend the place against occupation by the Allied forces if, and when, such occupation shall be deemed to be desirable. Subsequent occupation of the city by our military forces would subject it to bombardment by Germany, but this would be a matter between Italy and Germany. In other words, while we would agree not to bomb the place we would not agree to occupy or use it at some future time.

The difficulties involved in our refusal to regard Rome as an open city are that Italy will immediately make known the fact that she

has indicated readiness to declare it as such and that we have refused the offer. Our enemies and people who have expressed an interest in the preservation of historic monuments will make capital of our refusal. They will lose sight of the fact that the move on the part of Italy is a last moment effort to save herself from the consequences of an impending defeat and to cripple as much as possible our war effort.

2. *Id., August 19* (pp. 596–598), cites United States views on the following as open cities: Brussels, May 10, 1940; Paris, June 13, 1940; Belgrade, April 10, 1941.

3. *Churchill Requests Resumption of Exchanges of Information on "Tube Alloys" [Atomic Bomb], June 10, 1943* (p. 630):

From the Prime Minister to Mr. Harry Hopkins personal.

As you will remember, the President agreed that the exchange of information on TUBE ALLOYS should be resumed and that the enterprise should be considered a joint one to which both countries would contribute their best endeavors. I understood that his ruling would be based upon the fact that this weapon may be developed in time for the present war and that it thus falls within the general agreement covering the interchange of research and invention secrets.

I am very grateful for all your help in getting this question settled so satisfactorily. I am sure that the President's decision will be to the best advantage of both our countries. We must lose no time in implementing it.

The resulting negotiations and arrangements extend to page 653 and give the appearance of having been rather at arm's length.

4. *Assistant Secretary of State Berle to the Secretary on Postwar Civil Aviation Policy, August 18, 1943* (pp. 679–681) [Excerpts]:

NOTE: For your confidential information, it is the general estimate that the policy of "grab" would suit British interests far better than ours, since they probably are in a position to obtain exclusive rights throughout practically all of Africa (other than the Portuguese possessions); throughout the British Commonwealth nations and India, and very likely throughout France through General de Gaulle and very possibly a fair proportion of the European continent. Since the important traffic routes lie across Canada, Britain and the West European countries, this might seriously handicap attempts of American aviation to expand beyond the Western Hemisphere. It might be pointed out to the British that discussions ought to await our sounding out of Congressional opinion; and that, indeed, the issues presented to American public opinion are very much the same as those which are being presented to British public opinion by different groups in the British Government and British commercial world.

The question may be brought up as to our attitude towards a possible cartel agreement between Pan American Airways and British Overseas Airways Corporation. (Rumors of such a cartel agreement have reached us; though they are not solidly substantiated it is plain that some steps toward that end have been taken without direct knowledge of any Government agency.) You might take the position that air rights are so intimately connected with problems of international security that no agreement by purely private parties could be accepted as binding on American policy.

5. *Postwar World Organization* (pp. 681–730).

In these pages the great creative work of Leo Pasvolsky, Special Assistant to the Secretary of State, stands out. Vignette: President Roosevelt, reading the Draft United Nations Protocol for the War and Transition Period (a blueprint for the Charter to come) remarked (p. 682): "This has thirteen articles. That's a bad number." He then suggested, according to a Pasvolsky memorandum, that it be reduced to a statement of principles, rather than designated a formal agreement.

This section of the volume is of great importance to the legal historian interested in the evolution of the United Nations Organization. The supervisory councils for the disposition of colonial territories (pp. 726–728) is particularly fascinating, especially the sentence in the subdivision on the South Pacific Region: ". . . France might later be represented on the Council if French administration over Indo-China is restored."

6. *Publication of the Minutes of the Council of Four, Paris, 1919* (pp. 1334–1345).

An aspect of the seemingly unending nature of bureaucratic history ends the volume. Mr. Roosevelt asks Mr. Hull to speak to him about something that Churchill had raised as to the correctness of publishing in *Foreign Relations* the notes on the conversations of the Big Four of 1919, considering that of them one, Lloyd George, was still alive. Mr. Hull stoutly defended the Department's plans to publish, adding:

> Mr. Lloyd George is indeed still alive but he himself published over fifty pages of extracts from the Big Four minutes back in 1938. The Italian Aldrovandi published voluminously from those minutes as did Baker in *Woodrow Wilson and World Settlement* and Tardieu to a lesser extent. So many have used them that nonpublication here could hardly be excused on the ground that Lloyd George is still living.
>
> We are now so committed to the project that withdrawal would be embarrassing. Some Congressmen and other proponents of the program would ask why it had been stopped. It would not be possible long to conceal the real reason and our Anglophobes might well capitalize upon the situation. Certainly we would not wish to accept responsibility for nonpublication and risk the assumption in the public mind that we had some ulterior motive for withholding publication.

COVEY T. OLIVER

Foreign Relations of the United States. Diplomatic Papers, 1944. Vol. VII: *The American Republics.* (Dept. of State Pub. 8333.) Washington, D.C.: U.S. Govt. Printing Office, 1967.* pp. x, 1710. Index. $5.50.

I

This is the fat first of three volumes on United States relations with Latin America in the war years volumes of *Foreign Relations* that I am reviewing

* I only undertook to review this volume in 1971. I hope my appraisal is still worth while; after all, it took "The Department" 23 years to print it!

for the JOURNAL. The books for 1945 and 1946 are also lengthy, thus precluding a single review of them all. As a group they show the intense interest of the United States in the "Home Hemisphere" during the World War II period—an interest so considerable as to have induced serious psycho-political reactions in the countries to the South when, from roughly 1947 to 1961, United States concern and awareness declined abruptly, to have been revived in the Kennedy-Johnson years, only to wane once more in contemporary times. The longer-range effects (legal and political) of this (as seen by the Latins) "on-off" nature of U.S. foreign affairs activities are yet to emerge fully.

In 1944 the United States was continuing the Good Neighbor Policy of 1933, and to it had been added in 1941–43 strong national interests in hemispheric security, the extirpation of Axis influence in the Hemisphere, development of raw materials sources, access to ports and airfield locations, and, wherever possible, legal and political—even military—association with the global effort of the "United Nations" (as the term was *then* used) Powers. The 1944 volume on the American Republics is the documentary history of the continuation of these earlier initiatives. It includes some of the steps that were to lead to the formation of a security-peacekeeping system by the Inter-American Treaty of Reciprocal Assistance (signed in 1947) and the Charter of the Organization of American States (signed in 1948). Among these steps—also significant for the development of the United Nations Charter—was the Act of Chapultepec (1945), whose conception is recorded in the volume here reviewed.

II

This volume is divided into two parts: Regional and Country-by-Country. The theme that unifies the parts and that was a major inducing cause of the Chapultepec Conference is United States concern about the attitude of Argentina toward the great contending forces. This is best seen in these extracts from the Argentine portion of the second part of the book:

1. *The Acting Secretary to the Diplomatic Representatives in the American Republics Except Argentina, Bolivia, and Chile* [Circular Telegram of March 4, 1944] (p. 260):

> . . . Prior to February 25, the Argentine Government had been headed by General Ramírez. On January 26, 1944, his Government broke relations with the Axis, and indicated that it proposed to go further in cooperating in the defense of the Western Hemisphere and the preservation of hemispheric security.
>
> Suddenly, on February 25, under well-known circumstances, General Ramírez abandoned the active conduct of affairs. This Government has reason to believe that groups not in sympathy with the declared Argentine policy of joining the defense of the Hemisphere, were active in this turn of affairs.
>
> The Department of State thereupon instructed Ambassador Armour to refrain from entering official relations with the new regime pending developments. This is the present status of our relations with the existing Argentine regime.

> In all matters relating to the security and defense of the Hemisphere, we must look to the substance rather than the form. We are in a bitter war with a ruthless enemy whose plan has included conquest of the Western Hemisphere. To deal with such grave issues on a purely technical basis would be to close our eyes to the realities of the situation.
>
> The support by important elements inimical to the United Nations war effort of movements designed to limit action already taken could only be a matter of grave anxiety. . . .

And, of course, not too far in the shadows was Juan Perón.

2. *Memorandum by the Director of the Office of American Republic Affairs* (Duggan) (pp. 325–326):

> A decade of the Good-Neighbor Policy has produced remarkable confidence by the other American republics in the United States. Indeed, our history has no parallel for the present situation.
>
> Why?
>
> The United States achieved this position by openly and frankly laying the Big Stick on the shelf and relying instead upon the development of a community of interests that would produce common attitudes and unity of action. We abjured force, economic and military, to attain our ends. We withdrew our marines. We undertook treaty commitments, without reservation, not to intervene in the affairs of our neighbors. As a result, little by little there abated the distrust of the United States caused by a policy of pressure and force. Slowly confidence was built up. The other American republics came to see that Uncle Sam was not going to bash them over the head when he became annoyed or when he wanted something they were not prepared to give. They respected our restraint when we were provoked by those who sought to take advantage of the Good-Neighbor Policy.
>
> The test of the new policy came with Pearl Harbor. In the darkest moment of the war—at a time when the Japs were running amok in the East Indies and Rommel was striking in Tripoli—they threw their lot with us.
>
> Why did the Good Neighbors come to our side?
>
> They acted not because Uncle Sam raised a menacing finger but because they thought it was the thing to do *in their own interests* (*which were identical with our interests*).
>
> This asset can be as important to us in the days ahead as it has been in the past.
>
> Yet it is this asset that we are risking by our present policy with Argentina.
>
> [VI]
>
> The present moment calls for a high level of statesmanship. We have, beginning with the Rio conference, created an Argentine bogey which is now returning to haunt us. If we are not careful we will dissipate our energies in chasing this phantom and thereby waste our strength needed in the pursuit of our main objective, namely, the creation of a decent postwar order.
>
> The United States will emerge from this war with power mobilized to a degree heretofore unknown. This fact, already realized by some of the Good Neighbors, will soon be crystal clear to all. They will judge us in the future by the wisdom and restraint with which we use our power. . . .

Prophetic? Applicable elsewhere in Latin America today?

3. U.S. recognition of the new regime was withheld, the Treasury Department was fended off (pp. 269–270) in its effort to freeze Argentine assets in the United States, and the British were pressured to follow the hard line, despite this from Mr. Churchill in response to a personal message from President Roosevelt (p. 333):

> . . . Please remember that this community of 46,000,000 imported 66,000,000 tons a year before the war and is now managing on less than 25,000,000. The stamina of the workman cannot be maintained on a lesser diet in meat. You would not send your soldiers into battle on the British service meat ration, which is far above what is given to workmen. Your people are eating per head more meat and more poultry than before the war while ours are most sharply cut. I believe that if this were put before Mr. Hull he would do all he could to help us to obtain a new contract and nothing which would jeopardize its chances. I therefore hope that you will do so.

4. On withholding recognition, the British Chargé wrote to Mr. Hull (p. 339):

> The Argentine Government, having fulfilled these requests to our satisfaction, would no doubt expect recognition. His Majesty's Government take the traditional view of the act of Recognition. Except on very rare occasions, it is to them not a moral approval of the Government in question, but an act of well established international procedure. Generally they do not believe that it should or can in fact be used to effect a change of Government. But experience has shown that in exceptional circumstances it can be used effectively as a bargaining instrument, and they believe that now it could and should be used quite plainly to extract certain concrete contributions to the common effort on the matters recommended by the Combined Chiefs of Staff. They believe too that this use would be approved generally by the public opinion of the United Nations. The more so because His Majesty's Government must frankly admit to serious misgivings as to the effect on the Latin-American temperament of the Argentine nation of ostracizing that country's Government.

III

The Argentine crisis brought about great U.S. activity vis-à-vis other Western Hemisphere states, with a range of responses that can easily be imagined by any Latin Americanist. Out of this stress the initiatives of the Mexicans and others toward a hemispheric conference on problems of war and peace (eventually the Chapultepec Conference) developed. As so often has been the case since, the North American response to the Latin idea was at first lukewarm, only to come with a bit of a rush later; consult pages 27–86.

Other region-wide matters can be seen from the Table of Contents, p. v, including several that once again compel one to reflect on the seemingly interminable nature of some international issues, viz.: armament distribution to the American Republics (87); problems of the Inter-American Coffee Board (134); establishment of diplomatic relations between the American Republics and the Soviet Union (170); construction of the Inter-American

Highway and Rama Road (187); withholding of recognition from the regime of Edelmiro Farrell (252).

IV

Brazil: In marked contrast with her neighbor, Argentina, Brazil (Getulio Vargas in control) shines as ally and friend who gave and got, as can be seen from the listings on p. vi: military aviation agreement between the United States and Brazil (543); arrangements for sending a Brazilian expeditionary force to the Mediterranean theater of operations (566); defense supplies and equipment for Brazil (567); jurisdiction in criminal matters over United States military personnel in Brazil (600); agreements between the United States and Brazil on rubber and the introduction of synthetic rubber into Brazil (603); Brazilian coffee crop (617); United States and Brazil shipping problems (642); Brazilian trade control methods (650).

Mexico: Here again, but with the cool and independent style typical of Mexican official (especially public) relations with the United States, close associations with the United States version of the Allied war effort are seen. These line items from p. viii reveal them: arrangements for training and service overseas of a Mexican Air Force fighter squadron (1182); rehabilitation of the Mexican National Railway Lines (1234); merger of telecommunications corporations in Mexico (1276); temporary migration of agricultural and other workers into the United States (1290); problems of the petroleum industry (1336).

Colombia's co-operation included the internment of enemy nationals (pp. 806–808), the training of Colombian flyers for combat, utilization of Lend-Lease material (pp. 808–824) (with the usual short-supply agonies of the times), a declaration of a state of belligerency with Germany and joint efforts to control financial transactions involving the Axis, including a "Replacement Program for the Axis Drug and Chemical Industry" (pp. 832–851). There were also questions of the insurance coverage and governmental immunities in Colombia of United States wartime agencies, such as the Rubber Development Corporation (pp. 864–881), the Department of State holding firm to the end that the corporations were immune. Colombia graciously, after a good legal-diplomatic joust, suggested immunity to the court in a pending case; and the United States with guarded generosity then instructed its Chargé by telegram (p. 880):

> . . . The Department considers that these matters should be settled out of court, if possible, and where this is not feasible that the agencies should submit to the jurisdiction of the courts as a matter of grace and rely on the courts for administration of justice; also that if the decisions of the courts should show a tendency to unreasonableness, we may reconsider the matter in the light of developments. However, this statement does not apply to the seizure of funds or other property of this Government.

Thus endeth an episode between two friendly states in both of which legal principles and separation of powers are highly held!

Others: Discretion, both editorial and diplomatic, counsels against continuing this section of the review. There were other problems and other attitudes, both ways, as to the remaining countries and the United States in relationship to each of them. Historians of anti-Axis efforts in the Americas (still largely unwritten) have much here to mine.

V

Reading the "traffic" in this volume requires me to comment on the profound change that World War II made in United States foreign affairs operations. Here we begin to see the "From Doe to Brown" designators on telegrams—on messages between new agencies in Washington and their field representatives. Many of these men thus encapsulated into history by the message "slugs" are still active and now at "Establishment" age and authority. It should be remembered that for the old-fashioned, politically oriented "careerists" of 1941–44, they represented ideas and organizations that were disturbingly unorthodox. (I remember when the economic side of the Department of State was almost literally Herbert Feis and his stenographer! Now look at it!) In 1944, Morgenthau's Treasury was making its weight felt, and running with the ball whenever it could. War (Defense) was not yet very intrusive—that was to come later; but a Foreign Economic Administration (the new name for the Board of Economic Warfare) was operational. By a process of bureaucratic and national interest evolution it was to shift from the development of war potential in backward countries to the development of underdeveloped countries for the general good, taking new names over time and ending (?) as USAID. Perhaps—but I certainly hope not—bilateral development assistance has ended. But even if it does, the foreign relations of the United States will never go back to what the "Old Turks" thought of it as being before the New Unwashed—the "Wild Men" of one old pro of the time—descended upon them thirty-odd years ago. Of course, some of the "Wild Men" lived to become more "Old Blue" than those who received them then with distaste but with a canny appraisal of their imitative susceptibility.

COVEY T. OLIVER

Foreign Relations of the United States. Diplomatic Papers, 1945. Vols. IV and V: *Europe.* (Dept. of State Pub. 8366 and 8343.) Vol. IV: pp. viii, 1356; Vol. V: pp. viii, 1349. Washington, D. C.: U. S. Govt. Printing Office, 1968 and 1967, respectively. Indexes. $4.50 each.

1. The editors of *Foreign Relations* for 1945 saved the "big" items of that year for other volumes than these; viz., the unconditional surrender and occupation of Germany, U.S.-U.K. and Commonwealth matters, the ending of the war in Asia, and the San Francisco United Nations Conference. The volumes here reviewed contain much that is of historical im-

portance, such as efforts to reach satisfactory arrangements with Albania and Czechoslovakia (Vol. IV); the new tragedy of Poland and the situation of Spain in the immediate postwar period (Vol. V). From the standpoint of international law and the law of international organizations, however, these volumes are not particularly rich lodes.

2. From Vol. IV the international legalist may be interested in: (1) the effort to restrain the U.S.S.R.'s taking of almost everything in sight in defeated and/or occupied countries as "war booty" ("trophies" as the Russian-to-English translators always insisted) (p. 530); (2) the settlement by the United States of the Danish claim for forty vessels requisitioned by the U.S. in 1941, well before Pearl Harbor (p. 582); (3) various aspects of resumed relations with a once again self-governing France. However, (a) "Discussions regarding the future status of French Indochina and French participation in its liberation from Japanese occupation" (p. 795) and (b) "Provisional arrangements between the U.S. and France relating to air services between their respective territories" (*ibid.*), are carried elsewhere.

3. In Vol. V the most significant legal developments are probably these: (1) U.S. air bases in the Azores and Cape Verde Islands (p. 451); (2) several entries as to Spain, especially (a) the "buy-out" by Spain of the nation-wide telephone system owned by a subsidiary of I. T. & T. (p. 720), which included as a feature a management-service contract that is still in force and that has been of considerable influence on the formulation of such arrangements elsewhere. The reviewer's "how things do change" perspective requires a brief quotation from F.D.R.'s instructions to his new Ambassador (Armour), March 10, 1945:

> . . . Having been helped to power by Fascist Italy and Nazi Germany, and having patterned itself along totalitarian lines the present regime in Spain is naturally the subject of distrust by a great many Americans. . . .
>
> The fact that our Government maintains formal diplomatic relations with the present Spanish regime should not be interpreted by anyone to imply approval of that regime, and its sole party, the Falange, which has been openly hostile to the United States and which has tried to spread its fascist party ideas to the Western hemisphere. Our victory over Germany will carry with it the extermination of Nazi and similar ideologies. . . .
>
> . . . I should be lacking in candor . . . if I did not tell you that I can see no place in the community of nations for governments founded on fascist principles. . . .
>
> Therefore, we earnestly hope that the time may soon come when Spain may assume the role and the responsibility which we feel it should assume in the field of international cooperation and understanding. . . .

(3) As to "how things do drag on, year-after-year-after-year," consult this entry: "Efforts to assist Soviet spouses of American citizens and detained American citizens to leave the Soviet Union" (p. 1148). (4) Historical revisionism as to "blame" for the cold war might well feature this entry: "Conclusion of wartime assistance from the U.S. to the Soviet Union;

the agreement of October 15, 1945; consideration of a supplementary agreement for extension of aid for postwar reconstruction and credits" (p. 937).

COVEY T. OLIVER

The Future of Law in a Multicultural World. By Adda B. Bozeman. Princeton: Princeton University Press, 1971. pp. xvii, 229. Bibliography. Index. $6.50, cloth; $2.45, paper.

If there are still any jurists who dream of a world community living everywhere under an homogenized legal system of predominantly Western orientation, this book should come as a warning. It is an incisive exposition of the profound differences between Western legal theories and structures, on the one hand, and those of Islam, Asia and Africa, on the other. Some incidental but highly relevant remarks about the peculiarities of Soviet jurisprudence are reinforced by the translated text of the September 15, 1968, *Pravda* article purporting to justify the invasion of Czechoslovakia. Professor Bozeman perforce confesses that she has had to rely on secondary sources, but her use of the native authorities listed in an ample bibliography leaves little doubt of the essential accuracy of her findings. The text has the added virtues of clarity and grace.

Her survey has left her profoundly skeptical about such efforts as those of the United Nations to organize and maintain effective restraints upon international violence and the machinery necessary for the systematic, co-operative development and sharing of resources. Her one ray of hope seems to emanate from the potentialities of regional organizations operating under the general co-ordination that the United Nations might afford. But the concluding paragraph holding out this possibility hardly offsets the negativeness of what precedes.

The tone of the book might have been less pessimistic if the author had not set out from an excessively narrow conception of law. What contemporary school of legal theory would, for instance, entertain the dichotomy between law and custom that she attributes to the West? And who, on the ground that they are mere compounds of religion, etiquette, respect for leaders, and the unifying force of conflict, would refuse to classify as legal the African and Asian orders that she finds effectively holding human groupings together? Most legal orders must accommodate multiple diversities, and what is needed on the planetary scale is not a general Westernization but an overlay of common guidelines for the control of conflict and the safeguarding of the complex interchange and co-operation without which there can be no general economic and social advancement.

There are certain factors in the present human predicament, such as the fear of nuclear war, general recognition of the need to narrow the economic gap between North and South, and the planetary threat of environmental pollution, that move in the direction of strengthening supranational institutions. These Professor Bozeman has not thought relevant to her theme. For those who are not moved to despair by the inevitable gradual-

ness of progress towards an effective world normative order, her distinguished work is a challenge to action, not a signal for retreat.

P. E. CORBETT

Classification for International Law and Relations. 3rd ed. By Kurt Schwerin. Dobbs Ferry, N. Y.: Oceana Publications, 1969. pp. 130. $6.00.

Not being a librarian, this reviewer approaches Professor Schwerin's book with little knowledge about classification schemes and their value to librarians. He realizes also that to a busy librarian a generally adequate classification scheme with a good index, is an important tool in dealing with the avalanche of new books, and that once a particular scheme is adopted by a library, no librarian would voluntarily accept a new scheme requiring a complete re-classification, re-cataloguing and re-shelving of an extensive collection. Nevertheless, as a frequent library user and inveterate researcher, this reviewer would like to point out some of the practical and logical difficulties of this particular classification approach.

Suppose, for instance, that a researcher would like to find a book on the international status of individuals. Looking this subject up in Professor Schwerin's index, he would be referred to category "0025: Special topics," which rather incongruously is composed of such topics as "Consent; *Pacta sunt servanda*; Individuals in international law, etc." There is also a cross reference there to category "234: Human rights," which belongs to group "20: Nationality and citizenship," and subgroup "23: Aliens." But books on human rights in Europe belong to category "81. CE. 5 and 6: European Court of Human Rights and European Commission of Human Rights"; while books on human rights in the United Nations belong to category "67573: Social Problems, etc.," which is one of the "Special subjects" under "675: United Nations," a part of "International Relations."

If a researcher should look up such a traditional subject as "war," he will discover that some issues are considered under categories 50 to 58 in the section on "International Law," while others range from 607 to 617 in the section on "International Relations." Thus the topic "War crimes and their trials" is 6156, in the "International Relations" section, and not in the "International Law" section. On the other hand, international criminal law is under No. 38, which is cozily hidden in the subsection on Treaties.

Similarly, commercial treaties are under No. 363, while all topics relating to commerce are far away under Nos. 70–72; diplomacy is under Nos. 33–35, while foreign relations are under Nos. 63–64; international administration is under No. 39, while international organizations are under Nos. 75–81; boundaries are under No. 28, while boundary treaties are under No. 365 and boundary disputes are under Nos. 63–64.

I am sure that somehow this makes sense to a librarian or a bibliographer, but it is likely to drive a researcher wild. There must be a way to devise

a simpler system of classification which would ensure that books on the same subject would be located in the same place.

It may be possible perhaps to draw a lesson from a classification effort made by the European Governments in connection with the current effort to publish digests of state practice in the field of public international law. The Committee of Ministers of the Council of Europe, in Resolution (68) 17 of June 28, 1968, approved for this purpose a "Model Plan for the Classification of Documents concerning State Practice in the Field of Public International Law." This plan is certainly more rational than any others previously available, and can be easily adapted to classifying books as well as documents. Librarians and bibliographers should take a hard look at it, and see whether it could form a better basis for classification than the plan evolved in the book under review.

Professor Schwerin did an admirable job within the confines of an established system and his book can help the librarians to find quickly a niche for every book. What needs to be questioned, however, is whether the system itself has not outlived its usefulness. While change might be difficult for old libraries, at least new ones might wish to consider carefully whether a new classification, similar to the European one, would not serve modern library needs better. Perhaps some brave soul might convert the European categories into the number system so dear to librarians, and provide as good an index for it as Professor Schwerin has prepared for the old one.

LOUIS B. SOHN

The Law and Practices of the International Atomic Energy Agency. By Paul C. Szasz. Vienna: International Atomic Energy Agency, 1970. pp. viii, 1176. Annexes. Detailed Table of Contents. $32.00.

This massive text on the development, functions and administration of the International Atomic Energy Agency is certain to find a permanent place on the shelves of any collection concerned either with the peaceful use of atomic energy or with organizations paradigmatic of the United Nations family in action. It is a painstaking exegesis on how an international institution functions internally, in its relations with other international organizations and with member states and individuals, in pursuance of the objectives assigned to it under its Statute. The author's credentials are impressive, based upon eight years of legal service for the Agency during its formative period, when every conceivable manner of question attending the emergence of a new world entity was presented. The work is so meticulous in its grasp that it is almost impossible to imagine anyone producing it who had not been closely connected with the Agency.

Although it is hardly accurate to use the term "definitive" to describe a treatise dealing with the continuing life of an international body, such an adjective is not misplaced for that portion of the Szasz work assigned to the historical and developmental background of IAEA. There the job has been done once and for all. No finer presentation is to be found than

the treatment on pp. 12–67 of the antecedents and preparatory labor from which the Agency's Statute finally emerged. This legislative history is of great assistance in providing a framework of perspective within which the Statute must be interpreted. In retrospect, the hopes initially inspired that nuclear weapons development might somehow be restrained long appeared to have been too ambitious; yet more recent acceptance of safeguard controls by member nations attests the worth and the feasibility of the instrument itself. The record of the Agency's numerous projects, the extent of the technical assistance it has given to less developed countries, the scope of its research and training activities, the effort it has expended in the development of standards of health and safety in atomic progress, will surprise those unfamiliar with such programs.

The book is well organized and written in lucid language; but it does not make for easy reading both because of the nature of the subject matter and the method of treatment. Its primary value will doubtless be as a reference source, which was the author's principal objective. So many facets of the Agency's activities are investigated that the minutiae may appear overwhelming to the lay lawyer. On the other hand, what seems to be an excessive preoccupation with the esoteric is consistent with Szasz's desire to present as wide a research coverage as possible for other scholars. In consequence, there is a great disparity between various sections of the work as respects the generality of its appeal. Of special interest is the treatment of the Statute's provisions on the receipt of nuclear materials (Section 16.2), the policies and procedures for negotiation of research contracts (Section 19.2.1) and the highly important matter—exclusive with the Agency—of the application of safeguards under Article 12 (Chapter 21) which is the heart of its Statute on controlling diversion to non-peaceful use of fissionable materials furnished to member governments. Without the safeguards function it is dubious whether there would have been sufficient impetus to create the Agency; and this is said despite the vigorous early efforts of some less developed countries to repudiate these very safeguard inhibitions after accepting the Statute. Szasz dissects the evolving background of safeguards without diminishing the difficulties which that complex question raised from its inception. His discussion of this controversial business is one of the most fascinating aspects of the Agency's development.

The international lawyer will find such matters as IAEA agreements with states, privileges and immunities of Agency officials, the settlement of disputes, patent and copyright problems and the critical question of liability incurred from routine activities as well as from a nuclear incident, competently handled. Of less attraction to the general public is a substantial portion of the book (150 pages) devoted to a myriad of internal housekeeping questions such as staff administration and financial operations.

Given so erudite and faithful an enterprise, it may border on cavil to advert to occasional pecadillos in typography, *e.g.*, the misreference in the Table of Contents to page "1115" instead of 1119 for Annex 3 (the Table of Leading States and Persons). The typography itself (8-pt. pica) is

irritatingly small for a work designed as a reference monograph; for that very reason the utility of the text would have been enhanced by an index, the absence of which is only partly overcome by the inclusion, in addition to a general subject outline at the beginning of the volume, of a minutely detailed, 30-page (but non-alphabetical) breakdown of the contents. It is, finally, somewhat bewildering that the author has not seen fit to reproduce the text of the Agency's Statute in any of the generous annexes.

Notwithstanding these minuscule strictures, Mr. Szasz has given to the profession a patient and indefatigable study of resounding excellence. He is to be congratulated on having executed a truly formidable project of research, compilation and analysis with a solid and enduring scholarship.

ALWYN V. FREEMAN

The Right of Hot Pursuit in International Law. By Nicholas M. Poulantzas. Leiden: A. W. Sijthoff, 1969. pp. xvi, 451. Index. Fl. 37.

Domestic law has had the good fortune of a long history of scholarly treatment of highly specialized subjects as well as more generalized texts; in contrast, earlier publicists of international law generally treated broad problems of the law in their works, with but few limited to a particular issue. During the past decade there have been emerging several monographs on specialized subjects in international law which, because of their general competence, are beginning to serve to fill certain voids in the examination of international law questions.

The Right of Hot Pursuit in International Law by Dr. Poulantzas is one of those highly specialized books which provides an exhaustive study of one particular issue. Because it is comprehensive and clearly developed, it should serve as a "particular constitution" on the question of hot pursuit. In essence, this reviewer would like to compliment the author on his work. In registering the compliment it is not intended that the volume is limited in value only to jurists and scholars, but must include those who have a responsibility in both a policy and an operational sense for invoking hot pursuit. It is this practicality, in addition to the specialized nature of the work, that attracts the attention of this reviewer.

Certainly there are particular areas in the text which will not find universal agreement. For example, the reviewer does not necessarily subscribe to the thought that the genesis of the doctrine is attributed to the turn of the century. Much earlier practice, while certainly not uniform, indicates that hot pursuit was in effect in some forms much earlier in history. It is rather surprising that, in the deliberations of the United Nations Committee on the Peaceful Uses of the Seabed and the Ocean Floor beyond the Limits of National Jurisdiction, during its 1971 sessions, the question of hot pursuit was not raised either in regard to old uses of the seas or new uses. Much attention by that Committee has been focused on the identifiable issues that they are charged to prepare for a 1973 Law of the Sea Conference. In connection with those issues many delegations, during 1971, presented lists of

subjects and issues that they felt necessary for resolution at a law of the sea conference. No list contained the question of hot pursuit. This is an anomaly because, with the increasingly pronounced desires of coastal states regarding specialized interests in the resources of the seabed and the high seas itself, it is clear that there will be pressures to accommodate the law of hot pursuit to the emerging regimes. If I may speculate, it might well be that hot pursuit may not come up as an issue before the Committee or the Law of the Sea Conference; should it not, it might well be that changes in the doctrine of hot pursuit will emerge through the practice of coastal states in the period following a successful law of the sea conference.

I recommend the book to those not only who study the seas but to those who have operational responsibility pertaining to the high seas.

BURDICK H. BRITTIN

The Soviet Union and the Law of the Sea. By William E. Butler. Baltimore and London: The Johns Hopkins Press, 1971. pp. xiii, 245. Index. $12.00.

This excellent study by Mr. Butler enlarges and extends his previous work in exposition and analysis of Russian and Soviet policies on the law of the sea. The special value of his inquiry is in the detailed examination of Russian practice and writings and equally fine scrutiny of later practice and writings of the Soviet state and scholars. As he makes clear, much Soviet doctrine represents a continuation or reflection of attitudes long established in that nation. The result of what sometimes seems like tedious, unnecessarily detailed examination of relatively ancient history is to place more contemporary Soviet attitudes in a context that adds considerably to understanding of Soviet approaches.

Mr. Butler does not neglect contemporary problems, although one wishes he had decided to treat them more fully. He notes that the Soviet Union was actually the first nation to express specific concern in an international body over a regime for high seas mineral resources, antedating Mr. Pardo's more dramatic intervention by several months. However, the Soviet move came in the Intergovernmental Oceanographic Commission, not in the United Nations. This and other evidence lead Mr. Butler to observe, very probably correctly, that this initiative in the IOC reflected a concern that these issues be kept in a technical forum and out of the General Assembly. Subsequent events strongly suggest that the U.S.S.R. should get high marks for anticipating and attempting to avoid serious political difficulties.

In his conclusion Mr. Butler traces broadly the evolution of Soviet interests from relative isolation through the Cold War period to its present status as a major maritime Power, and notes that attitudes toward the law of the sea parallel this evolution. The text of his book supplies the detail to support his analysis. In sum, this is a very good book and deserves to be read and studied by all who are now concerned about the public order of the oceans.

WILLIAM T. BURKE

Kashmir: A Study in India-Pakistan Relations. By Sisir Gupta. New York: Asia Publishing House, 1966. pp. xv, 511. Bibliography. Index.

Sisir Gupta's analysis of the dispute between India and Pakistan over Kashmir is a thoroughly researched, analytical statement of India's position, concluding that the festering ulcer of conflict over Kashmir can realistically be cured at minimal pain to the two parties only by blessing *de jure* the *de facto* cease-fire line of 1948. The effect of this, of course, is to give to India the bulk of the Vale of Kashmir, the heartland over which the territorial dispute is principally concerned. Nonetheless, the conclusion is well argued and, from the point of view of an outsider interested only in peace and stability, convincing. Of course, the conclusion could not be convincing to Pakistan, not because Pakistan scorns peace and stability, as Mr. Gupta at times seems to imply, but because Pakistan's claim in law and equity to all of Kashmir is far stronger than is acknowledged by Mr. Gupta (or any other Indian who has yet published). Yet, in this book, the bases for Pakistan's feelings are laid bare, then ignored, as are various weaknesses in the Indian legal position.

Despite a misleading use of adjectives from time to time that betrays Mr. Gupta's understandable bias in favor of Indian's position, the book is basically a historical analysis of the status of Kashmir from earliest times to 1966. The key moment at which Kashmir became a symbol of the soul-wrenching dispute in the subcontinent between religious community and secular democracy was the moment of an unacknowledged Indian shift in approach. In the late summer of 1947 India was willing to accept a plebiscite that would, it was clearly felt, make Kashmir a part of Pakistan (p. 92). In October of 1947 armed raiders, apparently supported by Pakistan, attempted to take over the Government of Kashmir; on October 27, 1947, the ruler of Kashmir formally signed the State over to Indian control. Thereafter, India would no longer speak seriously of plebiscites. Indeed, if I understand Mr. Gupta correctly, the Indian position, at that time or shortly after, became fixed that Kashmir was part of India *not* merely as a result of a possibly questionable accession (although no Indian would admit the accession to be questionable), but as a legal result of British legislation creating the two new Dominions. By that view, India was retroactively considered to be the complete successor to all the rights of British India, and Pakistan had only what rights it might specifically acquire (from India) as a seceding portion of Indian territory (p. 121).

The Indian view of the legal effect of the Kashmir accession agreement of October 27, 1947, must be contrasted with the diametrically opposite view taken by India as to the legal effect of the purported Junagadh accession agreement of August 15, 1947. There was (and still is) apparently no realization in India that Pakistan might be aggrieved by the Indian invasion of Junagadh to precisely the same degree (and for very similar reasons) that India was aggrieved by the attempted revolution in Kashmir supported by Pakistan.

Instead, as Mr. Gupta very ably shows, the Government of India concentrated on legalisms, unconvincing to all but Indians, to support the Indian policy of secularism in Kashmir. It is certainly difficult to dismiss the Indian policy concern, nor is Pakistan's interest in uniting the Muslims of the subcontinent in a separate single political order irrelevant to it. But the Indian penchant for leaping on specious legalisms to support otherwise rational policy must bear a major share of the burden for the current situation; had not the Government of India decided to rest on its questionable legal case for Kashmir, but carried through on its secular policy, permitting Kashmir to become part of Pakistan if the people there preferred, there would have been no significant threat to the political order of secular India growing out of the struggle over Kashmir. The Government of India would not have felt, as Mr. Gupta shows it does feel, that the failure of the international community to accept the Indian legal case implied a general unfriendliness towards the Indian attempt to establish secular democracy in South Asia. To those knowing the Indian reactions to criticisms of the legalistic Indian position that disregards facts in connection with the border dispute with China, this tale is depressingly familiar.

While Mr. Gupta would undoubtedly not appreciate the irony, his book is less convincing with regard to the Indian position on Kashmir or his suggested solution (which still seems the best solution if only it were politically feasible) than it is convincing with regard to the dangers of approaching problems with such one-sided convictions of rectitude that all disagreement is regarded as somehow morally reprehensible. To turn issues of policy to matters of principle by confusing legal argumentation with grand concepts of world order is to make all disagreements matters of blood. In that way adherence to international legality becomes a path to war; the conviction in the rightness of secularism becomes a religion.

ALFRED P. RUBIN

The First Fifty Years: The Secretary-General in World Politics 1920–1970. By Arthur W. Rovine. Leiden: A. W. Sijthoff, 1970. pp. 498. Index. Fl. 59.

A number of books and articles relating to the rôle of the Secretary General of the United Nations have appeared in recent years, but this is the first comprehensive work that deals with the subject during the span of time covered by both the League of Nations and the United Nations. It is a first-rate book, well planned, well documented, and well written, reflecting as it does the painstaking work of a careful and imaginative scholar dedicated to his task.

Dr. Rovine approaches his subject matter in a traditional manner. He devotes long chapters to each of the six Secretaries General—Sir Eric Drummond (1920–1933) Joseph Avenol (1933–1940), Sean Lester (1940–1947), Trygve Lie (1946–1953), Dag Hammarskjöld (1953–1961), and U Thant (1961–1971)—and then sets forth in a concluding chapter a number

of considerations having to do with the resources and the political functions of the Secretary General, how they have developed over half a century and what we should anticipate in the way of power and influence for the Office in the near future.

In outlining the evolution of the Secretary General's Office, the book naturally focuses attention upon one of the central questions facing the world community; whether its leaders wish the Office to become still more vital, dynamic and perhaps independent or whether its present limitations and characteristics are satisfactory. On this point the author makes clear his own strong preference for an expansion of the Office "as an essential element among the institutions required for the development of a rational world order system." Many of us could readily subscribe to this proposition. We all know, however, that the development of an Office of this kind depends more on personalities, the forces and factors of world politics, and the accidents of world history than it does upon the conscious decisions of diplomats and statesmen.

In evaluating the rôle of the six Secretaries General, the writer naturally has his favorites. He has words of high praise for Sir Eric Drummond for his excellent work in legitimizing and maintaining the notion of a truly international secretariat and in developing a political rôle for the Secretary General. He is less than enthusiastic about Joseph Avenol, who exerted little or no effort to strengthen the League's peacekeeping capacity or to develop in any appreciable manner the influence of the Secretary General's Office. Sean Lester falls somewhere in between. His rôle was essentially that of a caretaker who kept the idea of the League alive while World War II raged about him.

In the United Nations context Trygve Lie wins a fairly high mark. A bolder and more vigorous personality than Drummond, he legitimized the right of the Secretary General to take a position and to help shape policy affecting vital issues of world politics. The author's highest praise, however, is reserved for Hammarskjöld, a "brilliant" man whose contribution to world order was "enormous." He expanded the rôle of his Office far beyond the limits dreamed possible by the framers of the Charter and demonstrated that the United Nations could perform as an independent actor in world politics. He thus set a high standard for U Thant. The latter, nevertheless, has been able to reduce the controversy swirling about the Secretary General's Office at the end of Hammarskjöld's administration and to keep the confidence of the great Powers and most of the smaller ones. With a large constituency of Afro-Asian nations, Thant has succeeded where Hammarskjöld failed.

If one wished to pick flaws—and this reviewer does not—it could be argued that the author does not devote enough space to the evolving rôle of the Secretary General in the important task of nation-building. True, the U.N. Charter makes clear that the United Nations' first responsibility is the maintenance of world peace. But it is also true that nearly 90% of the U.N. staff are presently engaged in the economic, social, and humanitarian work of the Organization. And, given the interests of the new

states of Asia and Africa, it is highly likely that this side of the United Nations' agenda will assume greater rather than less importance as the years go by.

Even so, the author's decision to concentrate on the political activities of the Secretary General is probably a wise one. Not only is the subject matter more manageable; the fact is that most Secretaries General have been so preoccupied with peacekeeping and other political issues that they have had precious little time to devote to social and economic questions. This reviewer was among those who encouraged Dag Hammarskjöld during the 1950's to assume a more active rôle in co-ordinating the work of the U.N. specialized agencies and giving strong leadership to U.N. development programs generally. There was no question about his desire to move in these directions, but first priorities obviously had to be given to the Suez, Lebanese, and Congo crises—to mention only a few.

I have no hesitation whatsoever in recommending this book to all serious students of international organization, international law, and world politics. Not only does it give the reader a solid basis for understanding the nature of the Secretary General's Office with all its capabilities and limitations; it also gives him a better understanding of the great sweep of world history since 1920 from the perspective of the Secretary General and his rôle in the maintenance of peace.

FRANCIS O. WILCOX

The United Nations: The Next Twenty-Five Years. Twentieth Report of the Commission to Study the Organization of Peace. Louis B. Sohn, Chairman. Dobbs Ferry, N. Y.: Oceana Publications, 1970. pp. xiii, 263.

This report focused on the United Nations twenty-fifth anniversary as an occasion to stimulate rededication to the goals of the Charter and to project an agenda of steps toward the attainment of those goals. The Report itself consists of a summary sketch of the shortfalls in U.N. performance during the first quarter-century, a "Draft Declaration" proposed for adoption by the commemorative General Assembly, and a statement of eleven progressive "goals" covering such themes as world law, disarmament, peacekeeping, human rights, development and U.N. procedures, reinforced by 106 specific "steps toward the goals." The volume, edited by the Commission's distinguished chairman, Professor Louis Sohn, also encompasses ten "supplementary papers" by Commission members.

There is much that is fresh in the volume, although many ideas come from previous reports of the Commission, such as those on human rights and the bed of the sea. With exceptions, the volume is marked by the kind of determined optimism that finds in the failures and inadequacies of the past reason to hope for better performance in the future. Some of the ideas are sensible—such as suggestions for improving General Assembly procedures (Steps 84–90). A few ideas are simplistic: "the right of . . . economic self-determination to all non-self-governing peoples." Other ideas are pie in the sky, *e.g.*: *"The Goal*: To make the United Nations strong

enough so that all States will feel secure, and the States of the world disarmed enough so that no State would be able to challenge the authority of the United Nations. . . ." Indeed, it could be said that the theme of the volume is *might* makes *right*: if states are inspired to behave as they *might*, everything will come out all *right*.

The burden of the Report then is normative: to lay out guidelines to the progress that could be achieved if only the nation states would take an enlightened view of national interest in a hazardous, rapidly changing world. One discounts at one's peril the relevance and the power of good ideas whose time is imminent, as witness the Commission's own achievement in advocating as long ago as 1957 that international title be proclaimed over the bed of the sea. Yet this Report seems to demand of the world's nations more goodness and good sense than recent behavior gives ground to anticipate, even in the long perspective of the volume's title.

Withal, there is much instructive reading in the volume, particularly in some of the "supplementary papers." One might wish that more of the authors had followed the example of Professor Richard Swift who, in his paper "Peacekeeping and Peacemaking," proposed a series of sensible steps that the United States could itself take. Such proposals are helpful in identifying particular measures that can be pressed on accessible governments with the ability to advance the program.

LAWRENCE S. FINKELSTEIN

United Nations Commission on International Trade Law. Yearbook. Vol. I:*1968–1970.* pp. v, 300. $5.00; *Register of Texts of Conventions and Other Instruments concerning International Trade Law.* Vol. I. pp. v, 285. $4.00. New York, N. Y.: United Nations, 1971.

In 1966 the United Nations Commission on International Trade Law (UNCITRAL) was established by the General Assembly to foster "the promotion of the progressive harmonization and unification of the law of international trade," in the belief that such an effort, if successful, could assist in removing or reducing legal obstacles to the flow of international trade. The General Assembly had in mind the "private," not the public law of international trade—what lawyers know as the law of sales, negotiable instruments, bank acceptances, credits, and guarantees, and commercial arbitration. Public law matters, such as the General Agreement on Tariffs and Trade, the E.E.C. Treaty and inter-governmental commodity agreements (on tin, wheat, coffee) were not within the competence of UNCITRAL.

There had been a number of disparate groups functioning in the "private" international trade field, notably the Hague Conference on Private International Law and the International Institute for the Unification of Private Law, which for many years had sponsored the negotiation of conventions in the private law areas. These groups tended to reflect largely the private interest groups in the major modern trading nations; the con-

ventions were, in effect, negotiated and drafted by these interests and then signed and ratified by their governments. They tended, therefore, to reflect something less than a consensus of the much larger international community which has emerged as the "world" has increased from some 50 to some 150 countries. UNCITRAL was to perform both a "co-ordinating" and an innovative function, attempting through voluntary means, and in co-operation with UNCTAD (United Nations Conference on Trade and Development), both to discover what in fact was being done by existing organizations and assisting to avoid duplication, and to formulate conventions or otherwise help harmonization in areas where no other work was in progress.

How UNCITRAL has organized itself to perform these tasks, the priorities it has adopted, and the progress it has made to mid-1970 are outlined in the *Yearbook* (really a "five-year" book) under review. It is indeed a very complete outline. Twenty-nine UNCITRAL member countries (elected by the Assembly for 6-year terms) meet annually to review the work of two committees and their working groups, set their tasks and priorities, and debate important questions arising out of their work. The priority tasks are to establish uniform rules governing the international sale of goods, including periods of prescription (*i.e.*, time-limits of one year for claims by buyers based on failure of goods to meet specifications), and standard contracts of sale; negotiable instruments, bankers' commercial credits, guarantees and securities (*i.e.*, chattel mortgages); international legislation on shipping; and international commercial arbitration. Considering the relatively short period of time during which UNCITRAL has been operating, its progress has been satisfactory. It has established its immediate agenda of work, sorting out a few projects from a multitude of possible subjects. It has conducted an "inventory" in those areas, and enlisted the co-operation of the existing specialized private law groups.

The Commission has also published a *Register of Texts of Conventions and Other Instruments*, containing the texts of such instruments in the sales, negotiable instruments, commercial credits, guarantees and securities fields, and a list of agreements in the arbitration and shipping area, which are of value to the interested general public as well as to delegates of countries working on harmonization and unification in these areas of the law.

"Harmonization" and "unification," no less than more obvious forms of innovation, are certainly not less difficult and time-consuming in the private international legal areas of sales and negotiable instruments than they have been found to be in the respective domestic law areas. It took decades to work out the Uniform Sales and Negotiable Instruments Acts in the United States, and then additional decades to rework and "harmonize" them in the Uniform Commercial Code. The task of UNCITRAL must be viewed in these terms, and if the speed with which it moves forward sometimes will appear to be glacial, this should not be too surprising or disconcerting.

Indeed, perhaps the most important by-product of its work (if not the major product itself) may be UNCITRAL's educative effects, as more people from more countries become aware of what has been done as well as what needs still to be done by way of improving the instrumental techniques of carrying on trade. Here, the beginnings which have been made toward increasing the training and publication activities of UNCITRAL deserve special applause and encouragement. Expansion of publications beyond Volume I of the *Register* to cover, systematically, texts and lists in other important areas of trade law, and the financing of special educational programs under UNCITRAL auspices in member countries, especially developing countries, are two concrete steps which seem to warrant serious consideration.

STANLEY D. METZGER

La Protection des Sociétés Commerciales et des Intérêts Indirects en Droit International Public. By Lucius Caflisch. The Hague: Martinus Nijhoff, 1969. pp. xvi, 287. Bibliography. Table of Cases. Index.

The nationalization of American interests in the Chilean copper industry and of British interests in the Libyan oil industry has again sharpened focus on the rights of foreign investors under public international law. The studied refusal of capital-exporting states to break off diplomatic relations because of these activities and the emphasis on finding peaceful means of redress require a sensible assessment of these risks to which foreign investments are exposed.

Professor Caflisch of Geneva's Graduate Institute for International Studies has timely provided a scholarly and disinterested analysis of the law in this area. He begins with the basic elements: the legal nature of business organizations employed in international trade, and the general rules governing the responsibilities of states for ill-treatment of foreigners and their economic interests.

As rights acquire meaning in international relations when they are respected and protected by states, consideration is next given to diplomatic protection of business firms. Nationality, a difficult concept when applied to an individual, is the terminology given to the link between a state and a business firm. In this context, the term raises many problems. A modern corporation engaged in international business may be organized in one country, and have its principal business operations in other countries. A corporate parent might have subsidiaries chartered in many different countries. Some of these subsidiaries may involve joint ventures with nationals of other countries. Shareholders of a corporation engaged in international trade may change from day to day as securities are traded on stock exchanges of several countries. Who then controls it or owns it, if these criteria are meaningful in terms of nationality?

Professor Caflisch carefully assesses the precedents found in conventional and customary law and examines the writings of scholars for *"la doctrine."* In the last analysis, nationality of a corporation attains vitality only when

and to the extent a state decides to recognize the corporation as its "national." The claim of nationality can and should be recognized by other states only when based on one or more of several criteria which provide a minimal effective link, including incorporation or constitution, business headquarters, principal place of business and control. But nationality conferred upon a corporation by a state may not be asserted against a state whose nationals exercise a direct or indirect control over the firm.

Far more complex are the problems created when a corporation injured by a state is owned in substantial part or controlled by persons who have a nationality different from that of the corporation. Writing before *Barcelona Traction*[1] was decided by the International Court of Justice, but in light of the briefs filed in that case, the author assesses the conventional and customary law and criticizes the views expressed by scholars and foreign offices.

In his preface to this thorough study, Professor Paul Guggenheim remarks that it is not a work *de lege ferenda*. This makes it all the more valuable as a reliable source book for anyone seeking an entrée to the essential treaties, cases and writings bearing upon the redress of injuries by states to international corporations. Many books and articles are written about fragments of the problem dealt with here. Few authors attempt to cope with it in its full dimensions.

JOHN T. MILLER, JR.

Foreign Enterprise in Mexico: Laws and Policies. By Harry K. Wright. Chapel Hill: The University of North Carolina Press, 1971. pp xv, 425. Index. $15.00.

This is the fourth of a series of books commissioned by the American Society of International Law on alien enterprise in key foreign countries. Earlier books looked to Colombia, India and Nigeria. The final volume on Japan is said to be in the hands of the printers. With Professor Wright's contribution, enough of the record is in to allow the Society to congratulate itself and its authors.

For the general reader, the book opens with real meat: one of the better surveys of the turbulent history and present uneasy but dynamic rôle of foreign investment in Mexico. This is followed by the essential bread and butter on which every foreign investor and his lawyer must sup: Mexicanization, the status of alien individuals and firms, the variety of Mexican business organizations from which the fledgling foreign investor must choose, tax, labor, secured transactions, patents and licensing agreements.

And the meal is balanced in another way as well. There is just enough in the way of summary of the endless Mexican business codifications to caution the wary and suggest questions deserving study by local counsel. But this description of the law as written is matched by some helpful hints

[1] Barcelona Traction, Light & Power Co., Ltd. Case, [1970] I.C.J. Rep. 3; 64 A.J.I.L. 653 (1970).

about where actual administrative practice takes over from stated principle.

The monograph stays within its own self-imposed bounds. There is no effort toward theoretical analysis or comparative conclusions. Professor Wright avoids the temptation to find a blueprint for the developing countries in Mexico's experience. But others—coming on this fresh description of how a real success story could emerge from the earlier days of Mexico's teeth-rattling confrontation with foreign investment—may not be able to resist.

WILLIAM D. ROGERS

Der Staat als Vertragspartner Ausländischer Privatunternehmen. By Karl-Heinz Böckstiegel. Frankfurt/Main: Athenäum Verlag, 1971. pp. 432. Indexes. DM.58.

"The State as a Party to Contracts with Foreign Private Enterprises" is a topic to which the author had previously devoted an article in this JOURNAL.[1] The book considers the important question under which circumstances a government, government department or government-controlled entity may be considered acting *jure gestionis,* thus eliminating the defense of sovereign immunity from foreign court jurisdiction. The international identification of the state party plays a decisive rôle when the state's sphere of influence in economic relations with foreigners has to be determined. Questions of the law applicable to the agreement, by an express contract provision or by deduction from the hypothetical will of the parties, and restrictions in the choice of the proper law of the contract are fully investigated.

Relations between public international law and the application of national laws in judicial and arbitration practice are further dealt with in interesting examples of recent date. The author presents a thorough discussion of the various doctrines developed in the literature and the decisional law of many countries. Agreements which, especially, developing countries have concluded with the government of the foreign party by bilateral or multilateral conventions, are further considered as a possible source of customary international law to be recognized for the protection of foreign interests not only in the investment field but more generally in the many instances of economic activities, such as construction of highways and plants, engineering and consulting services and various financial arrangements. Questions of guarantees by the home state of the foreign party will be of vital economic importance in view of the still unsettled question of an efficient enforcement of contractual rights, especially in cases of expropriation. The author describes also the guarantee schemes which have been developed in some capital-exporting countries.

The problem of responsibility of the successor state and *ad hoc* changes as to domestic law in their impact on contractual rights and obligations is well considered. Time-honored topics such as the *clausula rebus sic stantibus,* the concept of *pacta sunt servanda,* and the exhaustion of local remedies

[1] "Arbitration of Disputes between States and Private Enterprises in the International Chamber of Commerce," 59 A.J.I.L. 579 (1965).

are shown in their more recent consideration in legal writings and administrative practice. The book thus gives the opportunity of observing new trends in the formulation of appropriate international law aspects. With its ample annotations and an extensive bibliography, the book is an important contribution to the fast-changing development of the international law of economic relations.

MARTIN DOMKE

American Law Institute, Restatement of the Law Second—Conflict of Laws 2d. St. Paul, Minn.: American Law Institute Publishers, 1971. Vol. I: pp. xxviii, 734; Vol. II: pp. xxiv, 524; Vol. III (Appendix): pp. xlvi, 784. $75.00.

The second *Restatement of the Conflict of Laws* is the product of seventeen years of collective labor, ably directed by Professor Willis L. M. Reese of the Columbia University School of Law. It represents, in its general approach to the subject and in many of its specific provisions, a drastic departure from its 1934 predecessor. Even while being formulated, the first *Restatement* had been subjected to a barrage of criticism from the emerging school of legal realists, headed by Walter Wheeler Cook. By the 1950's, not only had the academic critics multiplied in numbers, but also the courts, led by Justice Traynor in California and Judge Fuld in New York, had begun to join them. The combined influence of scholarly writings and ground-breaking judicial opinions is clearly discernible when one compares the published tentative drafts of *Restatement Second* with the final version.

The new *Restatement,* double the length of the first, departs from the latter's structure by including, together with the familiar black-letter propositions of law and (more extended) comments, a series of "Reporter's Notes" summarizing case law and providing some references to secondary works supporting, and departing from, the black letter. As before, the jurisdiction of courts, the recognition and enforcement of "foreign" judgments, and the choice of law are covered, but the sequence of topics has been altered, advantageously, I think. The third volume collects digests of court decisions containing citations to the first *Restatement* and the published drafts of the second, a feature that might not survive if put to a benefit-cost-ratio test.

The new *Restatement* has abandoned, in many of its choice-of-law sections, the effort to prescribe specific rules to govern choice. Instead, it has resorted extensively to a formula to be applied by the choosing court. This formula is exemplified by the "general principle" applicable to "wrongs":

> §145 (1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, as to that issue, has the *most significant relationship* to the occurrence and the parties under the principles stated in section 6.

The words I have italicized reappear in the declarations of "general principles" applicable to other fields of law. Though §145 (2) lists a familiar array of physical "contacts to be taken into account" in making the

choice, the most meaningful directives in this programmatic formulation are to be found in §6, listing "the factors relevant to the choice of the applicable rule." These include desiderata that have been emphasized by the critics of the first *Restatement,* such as the "relevant policies of the forum" and "the relevant policies of other interested states and the relative interests of these states in the determination of the particular issue." However, they also embrace the goals pursued by the first *Restatement,* such as "certainty, predictability and uniformity of result."

The acceptance of the proposition that choice should be focused on "the particular issue"—a practice stigmatized on the Continent as *dépeçage*—opens the door to a consideration of the purposes of the rules between which choice is to be made and the policy considerations they reflect. However, it is apparent that the general provisions of the *Restatement Second* do not provide very effective guides to judicial choice; too often the considerations point in opposing directions, and courts, lacking more definite indications of preferences on choice-of-law grounds, are tending too often to opt for what each considers "the better rule" by purely domestic criteria, commonly that prevailing in its own State.

One major break from the first *Restatement* is not only more definite but also of very real practical importance: *Restatement Second* recognizes, subject to certain safeguards, the power of the parties to a contract to choose the law to govern their agreement, a position firmly rejected in the 1934 *Restatement* despite extensive recognition of party autonomy both in American case law and abroad.

Even though the quite extraordinary departures from past doctrines and decisions that have characterized American choice of law in the past fifteen years are not likely to be cast into a disciplined body of precedent by the new *Restatement,* its issuance is significant both in removing barriers and in according status to the developments that have been taking place during this period—developments that, incidentally, are attracting increasing attention abroad to *"l'école américaine contemporaine."*

DAVID F. CAVERS

BRIEFER NOTICES

International Law. Cases and Materials. 3rd ed. By William W. Bishop, Jr. (Boston and Toronto: Little, Brown & Co., 1971. pp. xlvi, 1122, Index. $16.00.) This well-established and excellent casebook appears in a third, revised and somewhat enlarged edition.[1] Some of the changes may be noted: in the first chapter (Nature, Sources, and Application of International Law) there is a new subsection on "Resolutions," including an excerpt from Judge Tanaka's Dissenting Opinion in the *South West Africa* Cases (Second Phase); "International Organization," previously a section in Chapter 3, has become a separate chapter including, in addition to the *Reparation* case, excerpts from the *Expenses* case and materials on the use of force, disarma-

[1] This JOURNAL reviewed the first edition in Vol. 48 (1954) at p. 349; and the second in Vol. 57 (1963) at p. 678.

ment and the Non-Proliferation Treaty; former Chapter 5 on Nationality has become Chapter 6 entitled "Individuals and Nationality," including the Covenant on Civil and Political Rights, the Covenant on Economic, Social and Cultural Rights, and the Optional Protocol to the former; the material on expropriation has been expanded to include the *Sabbatino* case, the Hickenlooper and Sabbatino Amendments, General Assembly Resolution 1803 (XVII) on Permanent Sovereignty over Natural Resources of December 14, 1962, and lump-sum Agreements with Yugoslovia and Poland of 1948 and 1960, respectively; in Chapter 10 on "Force and War" there are included documents relating to the Cuban missile crisis and the U.S. actions in Lebanon and Viet-Nam (a generous selection from Mr. Meeker's 1966 Memorandum). These and other changes are distinct improvements which will make this handy casebook even more attractive to teachers and students alike.

LEO GROSS

Derecho Internacional Público. 3d ed. By Modesto Seara Vázquez. (Mexico City: Editorial Porrúa, S. A., 1971. pp. 399. Index.) Concisely written and well organized, Professor Seara Vázquez' text on international law reflects his many years of experience as a professor of law and political science at the National University of Mexico. The book is conceived as a brief and elementary introduction to international law for the college student and general reader. It also serves as a source of the personal scholarly views of a leading Latin American author in the field.

With a fairly traditional organization and scope, the text principally covers the nature and sources of international law, its "subjects" (states, individuals, international and regional organizations), treaties, diplomatic functions, state territory (including law of the sea), peaceful solution of international conflicts, state responsibility and laws of war. It also contains as appendices the U.N. Charter and Statute of the International Court of Justice, bibliographies (particularly useful for noting related Spanish-language materials), and several drawings and charts as visual aids. Consistent with the author's objective, there are no footnotes.

While the text categorizes a panorama of theories and concepts, the author mainly emphasizes the political, historical and economic context of international law. Admirably, he includes a rich variety of specific modern examples to illustrate his points. He views international law as a dynamic system of norms, reflecting general conduct and responding to the constantly changing realities of international relations. At several points the author criticizes the "hypnotic" preoccupation with nation-states, observing that this has diverted attention from the necessary goal of a "universal law" serving the individual in society. He extols, as embryonic but vitally important steps towards this universal law, the tendency to accord international protection to the rights of individuals and the imposition of limits on state action by international institutions. Latin American practice is underscored in areas such as recognition of governments, regionalism, Calvo Clause and Drago Doctrine, and non-intervention.

In light of the author's demonstrated writing ability and far-ranging knowledge, one hopes he would contribute further to international law literature by preparing an expanded treatise going beyond the confines set for himself in this book.

MARVIN G. GOLDMAN

Der Begriff des Mikrostaats im Völkerrecht und in der internationalen Ordnung. By Dieter Ehrhardt. (Aalen, Germany: Scientia Verlag, 1970. pp. ix, 115. Bibliography. DM.22.00.) This monograph belongs to a small but growing literature on mini-states. The author reviews the scholarly literature in English, German and French, and he examines how some of the facts of mini-statal life fit into various definitions. He finds the literature inconclusive as to criteria for mini-statehood. He also reviews state practice through League and United Nations actions and finds it similarly inconclusive. He then selects from various definitions and adds and explains some of his preferences and concludes with a formal definition of his own which he offers for general acceptance:

> The microstate is an independent, effective political unit, with its own territory and less than 300,000 inhabitants, and is not sufficiently capable of implementing the international legal rights and obligations of States.[1]

Those who are interested in the terminological, doctrinal and definitional controversies will find this monograph useful in surveying that material in plentiful and multilingual annotations. But looking for a much broader context of the law and politics of mini-states, and for a handy and comprehensive source of relevant facts and documents, one would be far better off with UNITAR's *Small States and Territories: Status and Problems,* available in a 1969 version in mimeo, and in a 216-page printed volume of 1971.

PETER H. ROHN

Interstate Agreements on International Payments. A Study in International Economic Law. By Athanasios D. Paroutsas. (Athens: 1970. pp. 124. Bibliography. Index.) As a continuing balance of payments problem forces the Government of the United States to resort to increasingly severe measures to control dollar outflow, this is a timely primer for Americans long accustomed to the luxury of dealing in freely convertible dollars. European states, including the author's Greece, have faced the problem of maintaining international commerce despite currency non-convertibility with increasing sophistication since the widespread resort to currency controls in the 1930's. The book, originally submitted as the author's American doctoral thesis, categorizes and analyzes the various treaty arrangements used to prevent complete collapse of international trade. Beginning with simple compensation and barter agreements on a bilateral basis, the author progresses to flexible multilateral payments systems.

Although seriously flawed by inadequate proofreading, the work is generally competent and readable, and the inclusion of a brief discussion of Soviet-bloc payments arrangements is a definite plus. The single major deficiency is excessive attention to the most elementary forms of bilateral clearing and payments treaties. Admittedly, these agreements are still used by developing nations and in trade with Communist-bloc countries; however, the discussion of bilateral agreements receives twice the space devoted to multilateral treaties like the European Monetary Agreement. Typical of this approach, bilateral compensation and clearing agreements are each illustrated with a half-page diagram of currency and commodity flow, while the more advanced bilateral and multilateral payments agreements are unsketched. In spite of these shortcomings, this work should be a useful English-language addition to the materials on international payments agreements available to a concerned American.

WILLIAM E. ELWOOD

[1] Reviewer's translation.

Israel Nationality Law. By M. D. Gouldman. (Jerusalem: Alfa Press, 1970. Institute for Legislative Research and Comparative Law, Faculty of Law, the Hebrew University of Jerusalem. pp. 151. Indexes. $4.00.) This monograph fills a need in an area in which the law is comparatively newly developed and the writings, perhaps concomitantly, are relatively few. The author has, I think quite rightly, devoted a sizeable part of his work to a discussion of the anomalous Israeli Law of Return. The Law of Return (1950) allows virtually all Jews outside Israel to emigrate to Israel and the Israeli Nationality Law of 1952 permits most of these immigrants to gain Israeli citizenship by operation of law. The author discusses nationality by birth, by residence and through possessing the status of spouse or child of an Israeli national. He considers expatriation and thereafter the rights and duties which Israeli nationality confers on citizens of Israel.

The work contains, as references, the provisions of the Law of Return and the Israeli Nationality Law of 1952, with amendments to date. It might be argued that, for background reference, the book could have included the provisions of the British Order of July 24, 1925, regarding the Mandated Territory of Palestine, sometimes referred to as the Palestine Citizenship Order. The work is replete with pertinent Israeli judicial and administrative decisions on nationality and contains useful comparisons of Israeli laws with British and American nationality statutes.

There appears to have been a misprint in the book in the last paragraph of page 85 which adverts to Section 5 (a)(1), rather than to the more applicable Section 5 (a)(2), of the Israeli Nationality Law of 1952.

JOHN K. SPEER

The International Law of Communications. Edited by Edward McWhinney. (Leiden: A. W. Sijthoff; Dobbs Ferry, N. Y.: Oceana Publications, 1971. pp. 170. $7.50.) This book is a collection of eleven essays growing out of a colloquium held at McGill University in 1970. The title, however, promises too much: the essays do not map out "The International Law of Communications" but instead describe various activities, institutions and policies dealing with international communications, with particular emphasis on satellite broadcasting. It is questionable whether, as McWhinney argues in an introductory essay, the sum total of these disparate elements constitutes a "new" international law of communications.

The essays themselves are of varying quality. Among the best are Hinchman's essay on the technological environment, an exceptionally clear account of a complex and often confusingly presented area, and Jacobson's balanced and accurate view of the International Telecommunication Union. While three chapters are devoted respectively to an analysis of Asian, African and South American viewpoints on direct satellite broadcasting problems, no such viewpoint in fact emerges, although Valladão's essay presents some interesting material on South American approaches. There is also an imbalance in the topics covered. The essays substantially overlap each other in some areas, but do not adequately cover other equally important areas. For example, although several authors recognize the technical accomplishments of INTELSAT, there is an unfortunate tendency to dismiss it as U.S.-dominated, and a concomitant failure to recognize its importance as an international institution and examine in detail its workings.

In short, although the essays provide a useful source of information on a variety of topics, they offer few new insights or systematic analysis. This is unfortunate, because the subject requires detailed study rather than additional survey articles.

DAVID M. LEIVE

Kodifikacija Principa Miroljubive i Aktivne Koegzistencije [*Codification of the Principles of Peaceful and Active Coexistence*]. Edited by Dr. Milan Šahović. (Belgrade: Institute for International Political and Economic Affairs, 1969. pp. 426.) This is a collection of essays compiled by eight authors, present or former members of the Yugoslav Institute for International Political and Economic Affairs in Belgrade, or professors of law in Yugoslavia. The essays were inspired by Resolution 1966 (XVIII) of the General Assembly of the United Nations of December 16, 1963, which established the Special Committee on Principles of International Law Concerning Friendly Relations and Co-operation among States. This Committee acted as a projection of the United Nations Sixth (Legal) Committee. One of the authors, Dr. Konstantin Obradović, discusses the Prohibition of the Threat or Use of Force against the Territorial Integrity or Political Independence of States, one of the points debated in the Special Committee. Another, Dr. Obrad Račić, reports on the Settlement of Disputes by Peaceful Means: Dr. Aleksandar Magarašević on the Principles of Sovereign Equality of States; Dr. Tomislav Mitrović on the Non-Intervention in Domestic Affairs of States; Dr. Bogdan Babović on the Duty of Co-operation of States in Accordance with the United Nations Charter; Dr. Olga Šuković on the Principles of Equality and Self-Determination of Nations; and Dr. Milan Marković on the Duty to Comply in Good Faith with International Obligations in Accordance with the Charter of the United Nations. Dr. Milan Šahović, the editor of the collection, wrote an introductory summary entitled "Codification of Legal Principles of Coexistence and the Development of Modern International Law."

This collection of essays is, in substance, a comprehensive report of the activities of the Special Committee from 1964 to 1969. Yugoslavia has been a very active member of the Committee and introduced many draft resolutions, often supported by the so-called non-aligned states and by Communist-bloc countries. The central idea guiding the authors is the principle of peaceful coexistence between the more developed Western states and the less developed countries of Eastern Europe, Africa, Asia and Latin America. The book does not pretend to be an objective summary of the activities of the Special Committee, but reflects principally the view and positions of the delegates of Yugoslavia and of other non-aligned states. Even so, it is a valuable summation of the work performed in the Special Committee on Friendly Relations.

ZVONKO R. RODE

Droit International Pénal Conventionnel. By Stefan Glaser. (Brussels: Établissements Émile Bruylant, 1970. pp. 649. Index. Fr. 2200.) This is an extremely important work from the standpoint of international criminal law in that it combines a critical analysis of contemporary problems in this field, with over four hundred pages of documents comprising the most significant treaties relating to it. The examination of problems must by its very brevity be cursory; however, the fact that the student can in the same book consult the sources is most helpful. The author covers subjects ranging from problems of violations of international criminal law to transformation of international law standards into national law. He pays special attention in his concluding observations in Chapter IV to the principle *nullum crimen sine lege, nulla poena sine lege.* A reading of the first part gives one a general overview of the development of international criminal law and the complex issues involved. Precedents like the Nuremberg Trials are related to subsequent events and agreements.

The most striking impression one gains from this work, which concentrates on the conventional aspects of international criminal law, is the

need for further codification. At least a comprehensive integration of various agreements already concluded would be helpful. Professor Glaser has placed scholars pursuing this end in his debt.

The work is capped by a comprehensive index and a list of authors referred to, which includes most of the outstanding authorities in the field.

Aktuelle Probleme des Internationalen Strafrechts. Edited by Dietrich Oehler and Paul-Günter Poetz. (Hamburg: R. v. Decker's Verlag, G. Schenck, 1970. pp. xiii, 180. DM. 29.) This work is a compilation of essays in honor of the 65th birthday of Heinrich Gruetzner. Contributions are in different languages, English, French, and German. Subjects covered range from problems of extradition to conflicts of jurisdiction and the right of asylum. Like Gruetzner, who has been active as an official most of his life, a large number of authors are members of ministries in different European countries. Their vantage point tends to be practical and geared to the kind of problems authorities are likely to encounter, such as co-operation between police forces.

This slim volume is useful for students of European problems in criminal law. The perspective is inter-European. The fact that mainly practical problems are treated by authors who are officials makes it somewhat different from the usual *Festschrift* by academicians. Such co-operation between practitioners and scholars is to be commended at a time when theory is too often ignored by those in power. This is especially significant in the field of international criminal law where the Nuremberg Principles and other precedents have gone unheeded.

ROBERT K. WOETZEL

"Toute Prise Doit Être Jugée." Il Giudizio delle Prede nel Diritto Internazionale. By Luigi Sico. (Naples: Casa Editrice Dott. Eugenio Jovene, 1971. pp. xxxv, 266. Index. L. 4,000.) This monograph, No. 119 in the publications of the Juridical Faculty of the University of Naples, is the first comparative analytical study in depth of the brocard "every prize ought to be adjudicated" and its corollaries since Reuter's similar work of 1933. This fact and continued relevance of the laws of war and neutrality motivate the present inquiry.

Part I, prize judgment in the law of the principal maritime Powers, examines the origin, nature, composition, jurisdiction, procedure, and function of prize tribunals in relation to the problems under analysis. Part II, prize judgment in international law, deals with the international obligation to adjudicate prize and its connection with the duty to protect foreign interests; prize judgment, state responsibility, and private rights; the impact of the local remedies rule upon these questions; and the extraterritorial validity of prize judgments as *res judicata* between private parties. The author approaches these issues in the Italian subjective, positivist, dualist tradition. Hence his conclusions, generally accurately reflecting practice, frequently clash with the alleged predominant "internationalist" or monist views of Reuter and others. References, often extensive, to arbitral and treaty practice and, among others, to Italian, French, German and, especially, British and American doctrine, cases and materials, indicate the wide range of sources upon which this very professional, sound and useful contribution to the literature or, perhaps, history of the subject rests.

GEORGE MANNER

Världshavens Frihet och Fred. By Hilding Eek. (Stockholm: Bokförlaget Aldus/Bonniers, 1971. pp. 153. Sw.Kr. 29.) Hilding Eek is a professor of international law at the University of Stockholm. His book on *Freedom of the Seas and Peace* comprehensively surveys the legal

framework of the current turmoil surrounding exploitations of fish and minerals in and under the ocean. While the treatment is elementary, it is not condescending. Scandinavians who read it will be prepared to follow the oceanic aspects of the United Nations Environmental Conference scheduled for 1972 in Stockholm, and the 1973 Conference on the Law of the Sea which has been called by the General Assembly.

In a comparable book, *The Future of the Oceans* (Braziller, 1971), Wolfgang Friedmann expresses an initial bias against partition and *laissez-faire* national exploitation. Professor Eek prefers to delineate alternative solutions and to provide a basis for their evaluation. Still, he reaches conclusions which seem to this reviewer to coincide with Professor Friedmann's beginning. Eek speaks out against "protectionism" and argues that "support for freedom of research tops the list of current questions on the law of the sea, or in any case . . . competes for this position with the question of a new regime for the ocean floor" (p. 87). He also suggests that internationalization of the ocean floor would be advantageous and asserts that an international organization is needed to regulate fishing. The author is careful to call attention to the political preconditions of preferred legal solutions.

English-language readers who are interested in Eek's views should have a look at his article on "The Hydrological Cycle and the Law of Nations" in the 1965 issue of *Scandinavian Studies in Law*.

STANLEY V. ANDERSON

Petit Manuel de la Jurisprudence de la Cour Internationale de Justice. By P. M. Eisemann, V. Coussirat-Coustère and P. Hur. (Paris: Éditions A. Pedone, 1970. pp. viii, 310.) This "little handbook" of the jurisprudence of the International Court of Justice, as Professor Paul Reuter notes in his Preface, is the work of three students intended for students. It consists of brief résumés of the judgments and advisory opinions of the Court delivered since 1948, including in an *addendum* the *Barcelona Traction Co.* case; a short digest of statements of law made by the Court (since 1948); a list of all declarations accepting the jurisdiction of the Court as compulsory; the text of the American, French, British and Swiss declarations; a list of U.N. organs and international organizations qualified to request advisory opinions; and, finally, a list of instruments providing for dispute settlement by the Court.

This handbook will be particularly useful to students in France and Francophone countries. The book, *Decisions of the International Court of Justice* by J. J. G. Syatauw (1962),[1] was intended for a similar purpose in Anglophone countries. It is gratifying to see students taking an interest in the Court which, in the words of Professor Reuter, "is the organ and the only organ of an invisible international community in which States begin to familiarize themselves with their new social condition." (P. vi.)

LEO GROSS

The Canadian Yearbook of International Law, 1970. Vol. VIII (in English and French). C. B. Bourne, Editor-in-Chief. (Vancouver, B. C.: The University of British Columbia Publications Center, 1971. pp. ix, 429. Index. $14.00.) In the opening article of the *Yearbook*, R. St. J. Macdonald discusses "The New Canadian Declaration of Acceptance of the Compulsory Jurisdiction of the International Court of Justice." He notes, as to the reservation concerning domestic jurisdiction (p. 33), that only

[1] Reviewed in this JOURNAL, Vol. 58 (1964), at p. 554.

thirteen acceptances of the jurisdiction have been with this reservation, and submits that Canada should drop the reservation.

In their study, *"La coopération régionale: nouvelle voie ou impasse dans le développement du droit des satellites de radiodiffusion directe?"*, Christiane Verdon and Charles M. Dalfen envisage a solution with more emphasis on regional co-operation. Writing on "Superior Orders and the Reasonable Man," L. C. Green observes (p. 90) that "while it may be generally true that *lex specialis derogat generali*, the World Court has shown that this is not an inevitable principle. . . ." Anthony D'Amato, under the title "On Consensus," finds no particular need to adopt a "consent theory of international obligation" (p. 114), submitting (p. 122) that a dissenting state is not bound by a General Assembly resolution. Discussing "Succession to Treaties in New States," Okon Udokang refers to "imperial constitutional adjustments" (p. 134) and the practice of applying inheritance or devolution agreements *before* independence (p. 135). "Fluidity" of the law is noted, and the problem is described (p. 157) as "far from settled."

Jacques-Yvan Morin, considering recent developments concerning the law of the sea (particularly as to the Arctic), notes Canadian positions and United States practice. Also considered are Canadian reservations in acceptance of the obligatory jurisdiction of the World Court, and a possible new conference on sea law. Under the caption "The United States Antitrust Laws: A Canadian Viewpoint," D. H. W. Henry finds it yet to be determined whether there will be extension of principle to relieve from disability those who commit acts abroad in compliance with foreign government decrees at the request or with approval of such government. Listed (pp. 258–259) are eight principles. Described as "largely unexplored" (p. 278) are economic effects in Canada of United States antitrust enforcement, and noted (p. 280) are "debatable questions" of public international law.

"Notes and Comments" touch upon revision of the Warsaw Convention, Canada's rôle in the International Commission for Supervision and Control in Cambodia, Commonwealth "extradition," and the relevance of international adjudication. Forty-eight pages relate to Canadian practice in international law and conflict of laws, and fifteen to digests of Canadian decisions. There are nine book reviews.

The 1970 *Yearbook* maintains the high standards which previous volumes have set.

ROBERT R. WILSON

Basic Documents on Human Rights. Edited by Ian Brownlie. (Oxford: Clarendon Press, 1971. pp. x, 531. Index. $11.25, cloth; $5.75, paper.) There has been a trend of late to give greater emphasis to the concern with human rights and socio-economic developments in the teaching of both international law and international organization. The existing case and textbooks do not yet reflect this trend adequately and therefore this collection of documents will be gratefully welcomed. It contains, along with brief introductions, a selection of national constitutional provisions on fundamental freedoms, beginning with the English Bill of Rights of 1688, of the resolutions and conventions of the United Nations, of the conventions of the International Labor Organization and UNESCO, and of European, Latin American and African documents. It includes a substantial excerpt from the Dissenting Opinion of Judge Tanaka in the *South West Africa* cases (Second Phase) which, in the author's view, "contains what is probably the best exposition of the concept of equality in the existing literature" (p. 455). Equality is "the great theme which pervades the

provisions of the U.N. Charter and other instruments, both national and international, concerned with human rights and civil liberties" (p. 237). The volume concludes with three documents relating to trade and development. This aspect of human rights is generally left to economists but should be of concern to international lawyers as well, for, as Dr. Brownlie rightly points out: "The formal rules and standards concerning the Rule of Law and human rights have little meaning or possibility of effective application in societies in which a substantial proportion of the population are subject to unemployment, malnutrition, starvation, and illiteracy" (p. 493).

This reviewer agrees with Dr. Brownlie's view that "a major achievement of the draftsmen of the Charter of the United Nations was the emphasis of the provisions on the importance of social justice and human rights as the foundation for a stable international order" (p. 91). But his caveat that "many (national) constitutions bear but an obscure relation to the actual state of affairs in political and legal life" (p. 1) applies as well to the constitution of the United Nations, and the standards and conventions adopted by it and other international organizations. This excellent collection should encourage greater emphasis and scope for the study of human rights in law schools and political science departments.

LEO GROSS

United Nations Peace-Keeping Operations: A Military and Political Appraisal. By James M. Boyd. (New York, Washington and London: Praeger Publishers, 1971. pp. xv, 261. Bibliography. Index. $15.00.) Colonel Boyd combines United States Air Force experience as air attaché in Cairo and membership on the United Nations Military Staff Committee with academic credentials, including a Columbia Ph.D. following research associate status at the Institute of War and Peace Studies. He defines peacekeeping as employment of international military presence, consented to by troop-contributing states and the country(ies) where the operation occurs, to prevent or curtail violence by using limited force and to create an environment conducive to pacific settlement. The definition excludes the Korean experience. The author states: "The conclusion of a general agreement to create a permanent peace force of sufficient size and authority to impose sanctions has obviously not been possible to date and does not appear to be likely." (P. 12.) He advocates *ad hoc* arrangements employing limited force, supported by widespread consensus of the international community.

This study concentrates on comparative examination of the Middle East, Congo and Cyprus operations. It concludes that each occurred in a new nation emerging from colonial status following violence uncontainable by the domestic government; involved emotional nationalism making pacification efforts of former colonial Powers inflammatory; and constituted a threat to international peace warranting prompt international presence in default of effective national or regional solution.

A "Legal Basis" chapter declares these peacekeeping operations were compatible with both Charter principles and specific Charter provisions, notwithstanding the Soviet bloc and French contrary views. It asserts that these operations and the general consent thereto constitute legal precedents.

The book's principal contribution to peacekeeping literature is Part II, dealing pragmatically with military operations; problems of force creation, composition and organization; logistics; command and control, While refreshingly undogmatic, it stresses, not surprisingly, that components should normally come from small non-cold-war states, preferably in the

general region of employment; force commanders should have direct command over all force components, including logistical elements, and should report directly to the Secretary General; headquarters staffs should be small; force structures flexible, adjustable and mobile.

In Part III the author expresses the belief that preventive diplomacy and military readiness pre-planned by an augmented staff of the Military Adviser to the Secretary General may effectively accomplish the United Nations' peacekeeping mission.

SEYMOUR W. WURFEL

L'Immunité de Juridiction et d'Exécution des Etats. A propos du Projet de Convention du Conseil de l'Europe. Actes du Colloque Conjoint des 30 et 31 Janvier 1969. (Brussels: Editions de l'Institut de Sociologie de l'Université Libre de Bruxelles, 1971. pp. 317.) This study, a joint effort of international legal experts drawn from the Centers of International Law of the Universities of Brussels and Louvain, constitutes a good example of the contribution which university initiative can make to the expanding field of international law. University influence in Europe, in this regard, has been traditional. Thus it may be expected that this joint effort will be seriously considered by the Council of Europe in connection with its Convention on the Immunity of States from Jurisdiction and Execution, which document has been thoroughly analyzed and discussed by the Belgian scholars.

The subject of sovereign immunity is one which for many years had remained relatively constant and clearly predictable. However, with the growing commercial and trade relations of states and the proliferation of trade and kindred governmental missions throughout receiving states, it is quite natural that the more alert among them should focus greater attention on the negative side of the principle of sovereign immunity; that is, on those cases in which the doctrine should not prevail. The convention itself, drafted by a committee of experts of the Council of Europe, includes an enumeration of a series of situations in which Contracting States may not invoke their sovereign immunity (Articles 2–11). These articles represent by far the most vital portion of the convention from the point of view of those international legal scholars and practitioners who do not feel that sovereign immunity is an inflexible or immutable doctrine.

The Belgian study of the convention is, in effect, a thorough and well-documented treatise on the major elements of a subject of international law which deeply affects the relations between states. It is not an easy matter to alter a traditional practice once states have become accustomed to it. Perhaps it is this traditional concept which governed the court in a recent U.S. case, *Isbrandtsen Tankers, Inc.* v. *President of India* (U.S. Ct. of Appeals for the 2nd Cir., decided July 27, 1971).[1] In that case, a formal written suggestion of immunity was filed by the Department of State, and the court dismissed one of several causes of action, in reliance upon the suggestion, dismissing the argument of the plaintiff that his cause of action was of a private commercial nature and under the "Tate letter" should have deprived the defendant of a valid claim of immunity. "A judicial decision against the government of a foreign nation could conceivably cause severe international repercussions, the full consequences of which the courts are in no position to predict," enunciated the court.

SHELDON Z. KAPLAN

[1] Reported above, p. 396.

Quelques Problèmes de Succession d'États Concernant le Viet-Nam. By Nguyen-Huu-Tru. (Brussels: Établissements Émile Bruylant, 1970. pp. xii, 323. Fr. 980.) An American, or, for that matter, anyone else who has been inundated with news of the Vietnamese struggle for the past ten years, might expect a book entitled *Quelques Problèmes de Succession d'États Concernant le Viet-Nam* to deal with both North and South Viet-Nam and with, among other things, the continuing struggle between the two states. He would, for the most part, be disappointed, for *Quelques Problèmes* is instead a discussion of the rights and duties of successor states in general and the Republic of Viet-Nam (South Viet-Nam) in particular. Moreover, it is a work in which the author is far more concerned with bilateral and multilateral treaties—an emphasis which to some might seem misplaced, since none of the treaties has very much to do with the conflict raging in Viet-Nam—than he is with that conflict. It is, in short, a fine analysis of part of the Viet-Nam story.

Quelques Problèmes is beautifully organized and reads very well. Indeed, but for the fact that Nguyen-Huu-Tru mysteriously divorces his lucid discussion of Article 2 of the Treaty of Independence of June 4, 1954, from his discussion of the remaining sections of that treaty, the book could be said to be organized perfectly. And those issues which the author elects to cover, from the Chinese conquest in 221 B.C. to many of the treaties affecting the Republic of Viet-Nam, are ably discussed (inexplicably, however, he neglects to deal with Article 27 of the Agreement on the Cessation of Hostilities in Viet-Nam, which pertains to successors to the signatories of the Agreement).

If one is interested in a good discussion of the important question of the rights and duties of successor states and a South Vietnamese-oriented analysis of that question, *Quelques Problèmes* will prove extremely worth while. If he is concerned, however, with the full panoply of legal issues involving both states of Viet-Nam, he will have to turn elsewhere.

ROGER H. HULL

Crisis of Diplomacy: The Three Wars . . . and After. . . . By Abdul-Hafez M. Elkordy. (San Antonio, Texas: The Naylor Co., 1971. pp. xii, 296. Bibliography. $7.95.) The Middle East dispute is the crisis referred to in the title of this book. The author undertakes to elucidate its essential historical, psychological, humanitarian, territorial, legal, political and organizational factors from the beginning to the present. The book has a diplomatic focus, as indicated by its title, categorized, in chronological sequence, as embracing the diplomacy of alienation, of partition, of peace observation, of peacekeeping and, finally, of "'peace' through conquest." That some will disagree with some of the author's judgments as to issues and points of emphasis seems probable, due to the scope of the study embraced in so few pages, the author's generally pro-Arab orientation, and the impossibility of seeing in perspective a dispute still in being. It may be said, however, that it is in regard to the later phases of the conflict, beginning with the 1967 war, that the discussion takes on its greatest interest and cogency.

JOHN W. HALDERMAN

BOOKS RECEIVED *

Allard, Sven. *Russia and the Austrian State Treaty. A Case Study of Soviet Policy in Europe.* University Park and London: Pennsylvania State University Press, 1970. pp. 248. $7.95; 75 s. 6 d.

* Mention here neither assures nor precludes later review.

Asian-African Legal Consultative Committee. *Report of the Eleventh Session held at Accra (Ghana) 19th to 29th January 1970.* New Delhi: Secretariat of the Committee, 1971. pp. vi, 377.

Buch, Henri, Paul Foriers, Ch. Perelman. *L'Égalité.* Vol. I. (Travaux du Centre de Philosophie du Droit de l'Université Libre de Bruxelles.) Brussels: Établissements Émile Bruylant, 1971. pp. iv, 326. Fr. 509.

Cameron, Allan W. (ed.) *Viet-Nam Crisis. A Documentary History.* Vol. I: *1940–1956.* Ithaca, N. Y.: Cornell University Press, 1971. pp. xxiv, 452. Bibliography.

Cohn, E. J. (ed.) *Manual of German Law.* 2nd rev. ed. Vol. II: *Commercial Law, Civil Procedure, Conflict of Laws, Bankruptcy, Law of Nationality, East German Family Law.* (Comparative Law Series, No. 15.) London: British Institute of International and Comparative Law; Dobbs Ferry, N. Y.: Oceana Publications, 1971. pp. xxiv, 329. Index. $16.00.

Colliard, C. A., and A. Manin. *Droit International et Histoire Diplomatique. Documents Choisis.* Tome I. (Ouvrage édité avec le Concours du Centre National de la Recherche Scientifique.) Vol. I: *Textes Généraux.* pp. xiv, 430; Vol. II: *Afrique-Amérique-Asie.* pp. vi, 431–1226. Paris: Éditions Montchrestien, 1971. Index. Fr. 200.

de Burlet, Jacques. *Précis de Droit International Privé Congolais.* Kinshasa: Université Lovanium; Brussels: Maison Ferdinand Larcier, 1971. pp. xxiv, 370. Index. B. Fr. 750.

European Communities, Commission of. *Fourth General Report on the Activities of the Communities 1970.* Brussels and Luxembourg: 1971. pp. xxviii, 444. £1.67½; $4.00; Fr. 22.50. B. Fr. 200; DM. 15; Fl. 15.

Guárino, Giancarlo. *La Revisione dei Trattati. Spunti Critico Ricostruttivi.* Naples: Casa Editrice Dott.Eugenio Jovene, 1971. pp. xvii, 237. Index. L. 3,500.

Hammarskjöld Forum. *The Cambodian Incursion. Legal Issues.* Proceedings of the Fifteenth Forum, May 28, 1970. Participants: William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, Department of Justice; Robert B. McKay, Dean, New York University School of Law; John R. Stevenson, Legal Adviser, Department of State; Abram Chayes, Harvard University School of Law. Donald T. Fox, editor. Dobbs Ferry, N. Y.: Oceana Publications, 1971. pp. xv, 89. Bibliography. $7.50.

Haun, Kathryn (translator). *A Chinese Glossary of International Conference Terminology.* Washington, D. C.: Center for Chinese Research Materials, 1971. pp. xiv, 292. Indexes. $9.50, cloth; $5.75, paper.

Hubien, Hubert (ed.). *Legal Reasoning.* Proceedings of the World Congress for Legal and Social Philosophy, Brussels, 30 August–3 September 1971. Brussels: Établissements Émile Bruylant, 1971. pp. ix, 601. Fr. 806.

Inter-University Institute for International Law. T. M. C. Asser Institute. *Statutory Private International Law. Conflict of Laws—Substance and Procedure* (in French and English). Oslo: Universitetsforlaget, 1971. pp. xvi, 334. Index. $20.00.

Koller, Arnold. *Die Unmittelbare Anwendbarkeit Völkerrechtlicher Verträge und des EWG-Vertrages im Innerstaatlichen Bereich.* (Schweizerische Beiträge zum Europarecht, Vol. 8.) Bern: Verlag Stämpfli & Cie AG, 1971. pp. 216. Fr./DM. 45.

Maugey, Christian. *Les Moyens Juridiques de la Participation dans l'Entreprise en France et aux Etats-Unis (pour une politique des relations du travail).* Paris: Librairie Générale de Droit et de Jurisprudence, R. Pichon & R. Durand-Auzias, 1971. pp. 242. Fr. 43.

Max Planck Institut für Ausländisches Öffentliches Recht und Völkerrecht. *Judicial Protection against the Executive.* Vol. 3: *Comparative Law, International Law.* English edition. Cologne, Berlin, Bonn, Munich: Carl Heymanns Verlag KG; Dobbs Ferry, N. Y.: Oceana Publications, 1971. pp. xii, 400. German, French and English Indexes. $15.00. $75.00 for 3-vol. set.

Mayrand, Albert. *Traité Élémentaire de Droit Civil. Les Successions ab Intestat.* Montreal: Les Presses de l'Université de Montréal; Portland, Ore.: International Scholarly Book Services, 1971. pp. xxxvi, 428. Index. $17.50.

Miaja de la Muela, Adolfo. *Aportacion de la Sentencia del Tribunal de La Haya en el Caso Barcelona Traction (5 de febrero de 1970) a la Jurisprudencia Internacional.* Cuadernos de la Cátedra "J. B. Scott." Cursos en Vitoria de la Universidad de Valladolid. Valladolid: Gráficas Andrés Martín, 1970. pp. 147.

Monaco, Riccardo. *Manuale di Diritto Internazionale Pubblico.* Turin: Unione Tipografico Editrice Torinese, 1971. pp. xx, 731. Index. L. 8,000.

Nahlik, Stanislaw Edward. *Narodziny Nowozytnej Dyplomacji [Birth of Modern Diplomacy]* (in Polish and French). Wroclaw, Warsaw, Cracow, Gdansk: Zaklad Narodowy Imienia Ossolinskich Wydawnictwo, 1971. pp. 286.

Organization of the Petroleum Exporting Countries. *Selected Documents of the International Petroleum Industry 1970.* Vienna: OPEC, 1971. pp. 270.

Purser, W. F. C. *Metal-Mining in Peru, Past and Present.* Praeger Special Studies in International Economics and Development. New York, Washington, London: Praeger Publishers, 1972. pp. xii, 340. Indexes.

Rivista di Diritto Internazionale Privato e Processuale. *Les Problèmes Internationaux de la Faillite et le Marché Commun.* Padua: Edizioni CEDAM, 1971. pp. xiii, 304. L. 6,000.

Simma, Bruno. *Das Reziprozitätselement in der Entstehung des Völkergewohnheitsrechts.* (Schriftenreihe zum Geltenden Recht, Band 1.) Munich and Salzburg: Wilhelm Fink Verlag, 1970. pp. 82. DM. 16.80.

Stein, Eric. *Harmonization of European Company Laws. National Reform and Transnational Coordination.* Indianapolis, Kansas City and New York: Bobbs-Merrill Company, 1971. pp. lxxii, 558. Indexes. $22.50.

Sukijasović, Miodrag. *Foreign Investment in Yugoslavia.* (Yugoslav Foreign Investment Legislation at Work: Experiences So Far.) Belgrade: Institute of International Politics and Economics; Dobbs Ferry, N. Y.: Oceana Publications, 1970. pp. 178. $9.00.

Szawlowski, Richard. *Les Finances et le Droit Financier d'une Organisation Internationale Intergouvernementale.* (Ouvrage publié avec le Concours du Centre National de la Recherche Scientifique.) Examen sur la base de l'Organisation Mondiale de la Santé et Certaines Autres Organisations. Préface de Georges Langrod. Paris: Éditions Cujas, 1971. pp. iv, 221. Index.

Trubek, David M. *Law, Planning and the Development of the Brazilian Capital Market.* A Study of Law in Economic Change. (New York University Graduate School of Business Administration, Institute of Finance, Bulletin Nos. 72–73, April 1971.) New York: 1971. pp. 80. $2.00.

United States Department of State. *Foreign Relations of the United States 1946.* Vol. VIII: *The Far East.* (Dept. of State Pub. 8554.) Washington, D. C.: U. S. Government Printing Office, 1971. pp. viii, 1137. Index. $5.75.

Waldock, Sir Humphrey (ed.). *British Year Book of International Law, 1970.* Vol. 44. London, New York, Toronto: Oxford University Press, 1971. pp. viii, 314. Index. $19.25.

Williams, Walter L., Jr. *Intergovernmental Military Forces and World Public Order.* Leiden: A. W. Sijthoff; Dobbs Ferry, N. Y.: Oceana Publications, 1971. pp. xv, 703. Bibliography. $18.00.

Zweigert, Konrad, and Jan Kropholler. *Sources of International Uniform Law.* (In English, French and German.) Leiden: A. W. Sijthoff, 1971. pp. xxxii, 1056. Fl. 180; approx. $50.00.

OFFICIAL DOCUMENTS

UNITED NATIONS

DRAFT CONVENTION ON THE PROHIBITION OF THE DEVELOPMENT, PRODUCTION AND STOCKPILING OF BACTERIOLOGICAL (BIOLOGICAL) AND TOXIN WEAPONS AND ON THEIR DESTRUCTION *

The States Parties to this Convention,

Determined to act with a view to achieving effective progress towards general and complete disarmament including the prohibition and elimination of all types of weapons of mass destruction, and convinced that the prohibition of the development, production and stockpiling of chemical and bacteriological (biological) weapons and their elimination, through effective measures, will facilitate the achievement of general and complete disarmament under strict and effective international control,

Recognizing the important significance of the Geneva Protocol of 17 June 1925 for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, and conscious also of the contribution which the said Protocol has already made, and continues to make, to mitigating the horrors of war,

Reaffirming their adherence to the principles and objectives of that Protocol and calling upon all states to comply strictly with them,

Recalling that the General Assembly of the United Nations has repeatedly condemned all actions contrary to the principles and objectives of the Geneva Protocol of 17 June 1925,

Desiring to contribute to the strengthening of confidence between peoples and the general improvement of the international atmosphere,

Desiring also to contribute to the realization of the purposes and principles of the Charter of the United Nations,

Convinced of the importance and urgency of eliminating from the arsenals of states, through effective measures, such dangerous weapons of mass destruction as those using chemical or bacteriological (biological) agents,

Recognizing that an agreement on the prohibition of bacteriological (biological) and toxin weapons represents a first possible step towards the achievement of agreement on effective measures also for prohibition of the development, production and stockpiling of chemical weapons, and determined to continue negotiations to that end,

* U.N. Doc. A/8457, Oct. 6, 1971, Annex A. Submitted to the Conference of the Committee on Disarmament on Sept. 28, 1971, by the delegations of Bulgaria, Canada, Czechoslovakia, Hungary, Italy, Mongolia, Netherlands, Poland, Rumania, Union of Soviet Socialist Republics, United Kingdom and United States. Reproduced in 10 Int. Legal Materials 1177 (1971).

Determined, for the sake of all mankind, to exclude completely the possibility of bacteriological (biological) agents and toxins being used as weapons,

Convinced that such use would be repugnant to the conscience of mankind and that no effort should be spared to minimize this risk,

Have agreed as follows:

ARTICLE I

Each State Party to this Convention undertakes never in any circumstances to develop, produce, stockpile or otherwise acquire or retain:

(1) Microbial or other biological agents, or toxins whatever their origin or method of production, of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes;

(2) Weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict.

ARTICLE II

Each State Party to this Convention undertakes to destroy, or to divert to peaceful purposes, as soon as possible but not later than nine months after the entry into force of the Convention all agents, toxins, weapons, equipment and means of delivery specified in Article I of the Convention, which are in its possession or under its jurisdiction or control. In implementing the provisions of this article all necessary safety precautions shall be observed to protect populations and the environment.

ARTICLE III

Each State Party to this Convention undertakes not to transfer to any recipient whatsoever, directly or indirectly, and not in any way to assist, encourage, or induce any state, group of states or international organizations to manufacture or otherwise acquire any of the agents, toxins, weapons, equipment or means of delivery specified in Article I of the Convention.

ARTICLE IV

Each State Party to this Convention shall, in accordance with its constitutional processes, take any necessary measures to prohibit and prevent development, production, stockpiling, acquisition or retention of the agents, toxins, weapons, equipment and means of delivery specified in Article I of the Convention, within the territory of such state, under its jurisdiction or under its control anywhere.

ARTICLE V

The States Parties to the Convention undertake to consult one another and to co-operate in solving any problems which may arise in relation to the objective of, or in the application of the provisions of, this Convention. Consultation and co-operation pursuant to this article may also be undertaken through appropriate international procedures within the framework of the United Nations and in accordance with its Charter.

ARTICLE VI

(1) Any State Party to the Convention which finds that any other State Party is acting in breach of obligations deriving from the provisions of this Convention may lodge a complaint with the Security Council of the United Nations. Such a complaint should include all possible evidence confirming its validity, as well as a request for its consideration by the Security Council.

(2) Each State Party to the Convention undertakes to co-operate in carrying out any investigation which the Security Council may initiate, in accordance with the provisions of the United Nations Charter, on the basis of the complaint received by the Council. The Security Council shall inform the States Parties to the Convention of the results of the investigation.

ARTICLE VII

Each State Party to the Convention undertakes to provide or support assistance, in accordance with the United Nations Charter, to any Party to the Convention which so requests, if the Security Council decides that such party has been exposed to danger as a result of violation of this Convention.

ARTICLE VIII

Nothing in this Convention shall be interpreted as in any way limiting or detracting from the obligations assumed by any state under the Geneva Protocol of 17 June 1925 for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare.

ARTICLE IX

Each State Party to this Convention affirms the recognized objective of effective prohibition of chemical weapons and, to this end, undertakes to continue negotiations in good faith with a view to reaching early agreement on effective measures for the prohibition of their development, production and stockpiling and for their destruction, and on appropriate measures concerning equipment and means of delivery specifically designed for the production or use of chemical agents for weapons purposes.

ARTICLE X

(1) The States Parties to the Convention undertake to facilitate, and have the right to participate in, the fullest possible exchange of equipment, materials and scientific and technological information for the use of bacteriological (biological) agents and toxins for peaceful purposes. Parties to the Convention in a position to do so shall also co-operate in contributing individually or together with other states or international organizations to the further development and application of scientific discoveries in the field of bacteriology (biology) for prevention of disease, or for other peaceful purposes.

(2) This Convention shall be implemented in a manner designed to avoid hampering the economic or technological development of States

Parties to the Convention or international co-operation in the field of peaceful bacteriological (biological) activities, including the international exchange of bacteriological (biological) agents and toxins and equipment for the processing, use or production of bacteriological (biological) agents and toxins for peaceful purposes in accordance with the provisions of this Convention.

ARTICLE XI

Any State Party may propose amendments to this Convention. Amendments shall enter into force for each State Party accepting the amendments upon their acceptance by a majority of the States Parties to the Convention and thereafter for each remaining State Party on the date of acceptance by it.

ARTICLE XII

Five years after the entry into force of this Convention, or earlier if it is requested by a majority of Parties to the Convention by submitting a proposal to this effect to the Depositary Governments, a conference of States Parties to the Convention shall be held at Geneva, Switzerland, to review the operation of this Convention, with a view to assuring that the purposes of the preamble and the provisions of the Convention, including the provisions concerning negotiations on chemical weapons, are being realized. Such review shall take into account any new scientific and technological developments relevant to this Convention.

ARTICLE XIII

(1) This Convention shall be of unlimited duration.

(2) Each State Party to this Convention shall in exercising its national sovereignty have the right to withdraw from the Convention if it decides that extraordinary events, related to the subject matter of this Convention, have jeopardized the supreme interests of its country. It shall give notice of such withdrawal to all other States Parties to the Convention and to the United Nations Security Council three months in advance. Such notice shall include a statement of the extraordinary events it regards as having jeopardized its supreme interests.

ARTICLE XIV

(1) This Convention shall be open to all states for signature. Any state which does not sign the Convention before its entry into force in accordance with paragraph 3 of this article may accede to it at any time.

(2) This Convention shall be subject to ratification by signatory states. Instruments of ratification and instruments of accession shall be deposited with the Governments of ..... which are hereby designated the Depositary Governments.

(3) This Convention shall enter into force after the deposit of the instruments of ratification by twenty-two Governments, including the Governments designated as Depositaries of the Convention.

(4) For states whose instruments of ratification or accession are deposited subsequent to the entry into force of this Convention, it shall enter into force on the date of the deposit of their instruments of ratification or accession.

(5) The Depositary Governments shall promptly inform all signatory and acceding states of the date of each signature, the date of deposit of each instrument of ratification or of accession and the date of the entry into force of this Convention, and of the receipt of other notices.

(6) This Convention shall be registered by the Depositary Governments pursuant to Article 102 of the Charter of the United Nations.

ARTICLE XV

This Convention, the Chinese, English, French, Russian and Spanish texts of which are equally authentic, shall be deposited in the archives of the Depositary Governments. Duly certified copies of this Convention shall be transmitted by the Depositary Governments to the Governments of the signatory and acceding states.

In witness whereof the undersigned, duly authorized, have signed this Convention.

Done in ..... copies at .....
this ..... day of ....., ...

INTERNATIONAL CIVIL AVIATION ORGANIZATION

INTERNATIONAL CONFERENCE ON AIR LAW

CONVENTION FOR THE SUPPRESSION OF UNLAWFUL ACTS AGAINST THE SAFETY OF CIVIL AVIATION *

Signed at Montreal, September 23, 1971

THE STATES PARTIES TO THIS CONVENTION

CONSIDERING that unlawful acts against the safety of civil aviation jeopardize the safety of persons and property, seriously affect the operation of air services, and undermine the confidence of the peoples of the world in the safety of civil aviation;

CONSIDERING that the occurrence of such acts is a matter of grave concern;

CONSIDERING that, for the purpose of deterring such acts, there is an urgent need to provide appropriate measures for punishment of offenders:

HAVE AGREED AS FOLLOWS:

ARTICLE 1

1. Any person commits an offense if he unlawfully and intentionally:

* Printed from ICAO News Release, September, 1971; also reproduced in 10 Int. Legal Materials 1151 (1971).

(a) performs an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft; or

(b) destroys an aircraft in service or causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight; or

(c) places or causes to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or to cause damage to it which renders it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight; or

(d) destroys or damages air navigation facilities or interferes with their operation, if any such act is likely to endanger the safety of aircraft in flight; or

(e) communicates information which he knows to be false, thereby endangering the safety of an aircraft in flight.

2. Any person also commits an offense if he:

(a) attempts to commit any of the offenses mentioned in paragraph 1 of this article; or

(b) is an accomplice of a person who commits or attempts to commit any such offense.

ARTICLE 2

For the purposes of this Convention:

(a) an aircraft is considered to be in flight at any time from the moment when all its external doors are closed following embarkation until the moment when any such door is opened for disembarkation; in the case of a forced landing, the flight shall be deemed to continue until the competent authorities take over the responsibility for the aircraft and for persons and property on board;

(b) an aircraft is considered to be in service from the beginning of the preflight preparation of the aircraft by ground personnel or by the crew for a specific flight until twenty-four hours after any landing; the period of service shall, in any event, extend for the entire period during which the aircraft is in flight as defined in paragraph (a) of this article.

ARTICLE 3

Each Contracting State undertakes to make the offenses mentioned in Article 1 punishable by severe penalties.

ARTICLE 4

1. This Convention shall not apply to aircraft used in military, customs or police services.

2. In the cases contemplated in subparagraphs (a), (b), (c) and (e) of paragraph 1 of Article 1, this Convention shall apply, irrespective of whether the aircraft is engaged in an international or domestic flight, only if:

(a) the place of take-off or landing, actual or intended, of the aircraft is situated outside the territory of the state of registration of that aircraft; or

(b) the offense is committed in the territory of a state other than the state of registration of the aircraft.

3. Notwithstanding paragraph 2 of this article, in the cases contemplated in subparagraphs (a), (b), (c) and (e) of paragraph 1 of Article 1, this Convention shall also apply if the offender or the alleged offender is found in the territory of a state other than the state of registration of the aircraft.

4. With respect to the states mentioned in Article 9 and in the cases mentioned in subparagraphs (a), (b), (c) and (e) of paragraph 1 of Article 1, this Convention shall not apply if the places referred to in subparagraph (a) of paragraph 2 of this article are situated within the territory of the same state where that state is one of those referred to in Article 9, unless the offense is committed or the offender or alleged offender is found in the territory of a state other than that state.

5. In the cases contemplated in subparagraph (d) of paragraph 1 of Article 1, this Convention shall apply only if the air navigation facilities are used in international air navigation.

6. The provisions of paragraphs 2, 3, 4 and 5 of this article shall also apply in the cases contemplated in paragraph 2 of Article 1.

Article 5

1. Each Contracting State shall take such measures as may be necessary to establish its jurisdiction over the offenses in the following cases:

(a) when the offense is committed in the territory of that state;

(b) when the offense is committed against or on board an aircraft registered in that state;

(c) when the aircraft on board which the offense is committed lands in its territory with the alleged offender still on board;

(d) when the offense is committed against or on board an aircraft leased without crew to a lessee who has his principal place of business or, if the lessee has no such place of business, his permanent residence, in that state.

2. Each Contracting State shall likewise take such measures as may be necessary to establish its jurisdiction over the offenses mentioned in Article 1, paragraph 1 (a), (b) and (c), and in Article 1, paragraph 2, insofar as that paragraph relates to those offenses, in the case where the alleged offender is present in its territory and it does not extradite him pursuant to Article 8 to any of the states mentioned in paragraph 1 of this article.

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.

Article 6

1. Upon being satisfied that the circumstances so warrant, any Contracting State in the territory of which the offender or the alleged offender is

present, shall take him into custody or take other measures to ensure his presence. The custody and other measures shall be as provided in the law of that state but may only be continued for such time as is necessary to enable any criminal or extradition proceedings to be instituted.

2. Such state shall immediately make a preliminary enquiry into the facts.

3. Any person in custody pursuant to paragraph 1 of this article shall be assisted in communicating immediately with the nearest appropriate representative of the state of which he is a national.

4. When a state, pursuant to this article, has taken a person into custody, it shall immediately notify the states mentioned in Article 5, paragraph 1, the state of nationality of the detained person and, if it considers it advisable, any other interested states of the fact that such person is in custody and of the circumstances which warrant his detention. The state which makes the preliminary enquiry contemplated in paragraph 2 of this article shall promptly report its findings to the said states and shall indicate whether it intends to exercise jurisdiction.

ARTICLE 7

The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offense was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offense of a serious nature under the law of that state.

ARTICLE 8

1. The offenses shall be deemed to be included as extraditable offenses in any extradition treaty existing between Contracting States. Contracting States undertake to include the offenses as extraditable offenses in every extradition treaty to be concluded between them.

2. If a Contracting State which makes extradition conditional on the existence of a treaty receives a request for extradition from another Contracting State with which it has no extradition treaty, it may at its option consider this Convention as the legal basis for extradition in respect of the offenses. Extradition shall be subject to the other conditions provided by the law of the requested state.

3. Contracting States which do not make extradition conditional on the existence of a treaty shall recognize the offenses as extraditable offenses between themselves subject to the conditions provided by the law of the requested state.

4. Each of the offenses shall be treated, for the purpose of extradition between Contracting States, as if it had been committed not only in the place in which it occurred but also in the territories of the states required to establish their jurisdiction in accordance with Article 5, paragraph 1 (b), (c) and (d).

ARTICLE 9

The Contracting States which establish joint air transport operating organizations or international operating agencies, which operate aircraft which are subject to joint or international registration shall, by appropriate means, designate for each aircraft the state among them which shall exercise the jurisdiction and have the attributes of the state of registration for the purpose of this Convention and shall give notice thereof to the International Civil Aviation Organization which shall communicate the notice to all States Parties to this Convention.

ARTICLE 10

1. Contracting States shall, in accordance with international and national law, endeavor to take all practicable measures for the purpose of preventing the offenses mentioned in Article 1.

2. When, due to the commission of one of the offenses mentioned in Article 1, a flight has been delayed or interrupted, any Contracting State in whose territory the aircraft or passengers or crew are present shall facilitate the continuation of the journey of the passengers and crew as soon as practicable, and shall without delay return the aircraft and its cargo to the persons lawfully entitled to possession.

ARTICLE 11

1. Contracting States shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of the offenses. The law of the state requested shall apply in all cases.

2. The provisions of paragraph 1 of this article shall not affect obligations under any other treaty, bilateral or multilateral, which governs or will govern, in whole or in part, mutual assistance in criminal matters.

ARTICLE 12

Any Contracting State having reason to believe that one of the offenses mentioned in Article 1 will be committed shall, in accordance with its national law, furnish any relevant information in its possession to those states which it believes would be the states mentioned in Article 5, paragraph 1.

ARTICLE 13

Each Contracting State shall in accordance with its national law report to the Council of the International Civil Aviation Organization as promptly as possible any relevant information in its possession concerning:

(a) the circumstances of the offense;

(b) the action taken pursuant to Article 10, paragraph 2;

(c) the measures taken in relation to the offender or the alleged offender and, in particular, the results of any extradition proceedings or other legal proceedings.

ARTICLE 14

1. Any dispute between two or more Contracting States concerning the interpretation or application of this Convention which cannot be settled through negotiation, shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

2. Each state may at the time of signature or ratification of this Convention or accession thereto, declare that it does not consider itself bound by the preceding paragraph. The other Contracting States shall not be bound by the preceding paragraph with respect to any Contracting State having made such a reservation.

3. Any Contracting State having made a reservation in accordance with the preceding paragraph may at any time withdraw this reservation by notification to the Depositary Governments.

ARTICLE 15

1. This Convention shall be open for signature at Montreal on 23 September 1971, by states participating in the International Conference on Air Law held at Montreal from 8 to 23 September 1971 (hereinafter referred to as the Montreal Conference). After 10 October 1971, the Convention shall be open to all states for signature in Moscow, London and Washington. Any state which does not sign this Convention before its entry into force in accordance with paragraph 3 of this article may accede to it at any time.

2. This Convention shall be subject to ratification by the signatory states. Instruments of ratification and instruments of accession shall be deposited with the Governments of the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America, which are hereby designated the Depositary Governments.

3. This Convention shall enter into force thirty days following the date of the deposit of instruments of ratification by ten states signatory to this Convention which participated in the Montreal Conference.

4. For other states, this Convention shall enter into force on the date of entry into force of this Convention in accordance with paragraph 3 of this article, or thirty days following the date of deposit of their instruments of ratification or accession, whichever is later.

5. The Depositary Governments shall promptly inform all signatory and acceding states of the date of each signature, the date of deposit of each instrument of ratification or accession, the date of entry into force of this Convention, and other notices.

6. As soon as this Convention comes into force, it shall be registered by the Depositary Governments pursuant to Article 102 of the Charter of the United Nations and pursuant to Article 83 of the Convention on International Civil Aviation (Chicago, 1944).

ARTICLE 16

1. Any Contracting State may denounce this Convention by written notification to the Depositary Governments.

2. Denunciation shall take effect six months following the date on which notification is received by the Depositary Governments.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, being duly authorized thereto by their Governments, have signed this Convention.

DONE at Montreal, this twenty-third day of September, one thousand nine hundred and seventy-one, in three originals, each being drawn up in four authentic texts in the English, French, Russian and Spanish languages.

[Signed on behalf of Argentina, Barbados, Belgium, Brazil,[1] Bulgaria,[1] Byelorussian Soviet Socialist Republic,[1] Canada, Chad, Republic of China, Congo (Brazzaville), Costa Rica, Czechoslovakia,[1] Ethiopia, Gabon, Federal Republic of Germany, Greece, Haiti, Hungary,[1] Israel, Italy, Jamaica, Luxembourg, Mongolia, Netherlands, Panama, Philippines, Poland, Portugal, Senegal, South Africa, Switzerland, Trinidad and Tobago, Ukrainian Soviet Socialist Republic,[1] Union of Soviet Socialist Republics,[1] United Kingdom, United States, Venezuela, Yugoslavia.]

ARGENTINA-CHILE-UNITED KINGDOM

AGREEMENT FOR ARBITRATION (COMPROMISO) OF A CONTROVERSY BETWEEN THE ARGENTINE REPUBLIC AND THE REPUBLIC OF CHILE CONCERNING THE REGION OF THE BEAGLE CHANNEL *

Done at London, July 22, 1971

WHEREAS the Argentine Republic and the Republic of Chile (hereinafter referred to as "the Parties," named in alphabetical order in this instrument) are parties to a General Treaty of Arbitration signed at Santiago on 28th May 1902 (hereinafter referred to as "the Treaty");

AND WHEREAS His Britannic Majesty's Government duly accepted the duty of Arbitrator conferred upon them by the Treaty;

AND WHEREAS a controversy has arisen between the Parties concerning the region of the Beagle Channel;

AND WHEREAS, on this occasion, the Parties have concurred with regard to the applicability of the Treaty to this controversy, and have requested the intervention of Her Britannic Majesty's Government as Arbitrator;

AND WHEREAS Her Britannic Majesty's Government, after hearing the Parties, are satisfied that it would be appropriate for them to act as Arbitrator in the controversy;

[1] With reservation.

* Reproduced from the text provided by the Embassy of the United Kingdom at Washington, D.C., in 10 Int. Legal Materials 1182 (1971).

AND WHEREAS for the purpose of fulfilling their duties as Arbitrator, Her Britannic Majesty's Government have appointed a Court of Arbitration composed of the following members:

Mr. Hardy C. Dillard (United States of America)
Sir Gerald Fitzmaurice (United Kingdom)
Monsieur André Gros (France)
Mr. Charles D. Onyeama (Nigeria) and
Mr. Sture Petrén (Sweden);

Her Britannic Majesty's Government, in accordance with the Treaty and after consulting the Parties separately, have determined the Arbitration Agreement (Compromiso) as follows:

ARTICLE I

(1) The Argentine Republic requests the Arbitrator to determine what is the boundary-line between the respective maritime jurisdictions of the Argentine Republic and of the Republic of Chile from meridian 68°36'38.5" W, within the region referred to in paragraph (4) of this article, and in consequence to declare that Picton, Nueva and Lennox Islands and adjacent islands and islets belong to the Argentine Republic.

(2) The Republic of Chile requests the Arbitrator to decide, to the extent that they relate to the region referred to in paragraph (4) of this article, the questions referred to in her Notes of 11th December 1967 to Her Britannic Majesty's Government and to the Government of the Argentine Republic and to declare that Picton, Lennox and Nueva Islands, the adjacent islands and islets, as well as the other islands and islets whose entire land surface is situated wholly within the region referred to in paragraph (4) of this article, belong to the Republic of Chile.

(3) The questions specified in the two foregoing paragraphs express the will of the Parties as to the points in dispute which are to be decided by the Court of Arbitration.

(4) The region referred to in paragraphs (1) and (2) of this article is determined by six points the geographical co-ordinates of which are the following:—

	LATITUDE (S)	LONGITUDE (W)
A	54° 45′	68° 36′ 38.5″
B	54° 57′	68° 36′ 38.5″
C	54° 57′	67° 13′
D	55° 24′	67° 13′
E	55° 24′	66° 25′
F	54° 45′	66° 25′

(5) The order in which the questions appear in this Agreement (Compromiso) shall not imply any precedence of the one over the other with regard to their consideration by the Court of Arbitration, and shall be without prejudice to any burden of proof.

(6) The submissions in paragraphs (1) and (2) of this article which the Argentine Republic and the Republic of Chile respectively have presented shall not constitute for the other Party, either directly or indirectly, acceptance of the assertions of law or fact contained in those submissions.

(7) The Court of Arbitration shall reach its conclusions in accordance with the principles of international law.

ARTICLE II

The Court of Arbitration, acting in accordance with the provisions of this Agreement (Compromiso), shall consider the questions specified in paragraphs (1) and (2) of Article I and transmit to Her Britannic Majesty's Government its decision thereon.

ARTICLE III

(1) The Court of Arbitration shall elect one of its members as President. It shall also appoint a Registrar.

(2) The Court of Arbitration shall establish its seat at a place not objected to by either Party.

ARTICLE IV

(1) Each of the Parties shall, within one month after the date of the signature of this Agreement (Compromiso), appoint an Agent or Agents for the purposes of the Arbitration, who shall establish an address in the vicinity of the seat of the Court of Arbitration. The Parties shall communicate the names and addresses of their Agents to Her Britannic Majesty's Government, to the Court of Arbitration and to the other Party.

(2) If either of the Parties appoints more than one Agent, they shall be authorized to act jointly or severally.

ARTICLE V

(1) The Court of Arbitration shall, subject to the provisions of this Agreement (Compromiso) and after consultation with the Parties, settle its own rules of procedure and determine the order and dates of delivery of written pleadings and maps and all other questions of procedure, written and oral, that may arise. The fixing of the order in which these documents shall be presented shall be without prejudice to any question of any burden of proof.

(2) The Registrar shall notify to the Parties an address for the filing of their written pleadings and other documents.

ARTICLE VI

The Court of Arbitration may, at the expense of the Parties, appoint such experts as it may wish to assist it.

ARTICLE VII

The Parties shall give to any members of the Court of Arbitration and to any members of its staff, and to any authorised representatives of either

Party who have been requested by the Court of Arbitration to accompany the members of the Court or its staff, free access to their territories, including any disputed territory, on the understanding that the grant of such access shall in no way prejudice the rights of either Party as to the ownership of any territory to, on, through or over which such access is granted.

ARTICLE VIII

In the event of the Parties jointly or the Court of Arbitration desiring a survey, by air or otherwise, for the purposes of the Arbitration, such survey shall be made under the guidance of the Court of Arbitration and at the expense of the Parties.

ARTICLE IX

The Court of Arbitration shall be competent to decide upon the interpretation and application of this Agreement (Compromiso).

ARTICLE X

Each of the Parties shall defray its own expenses and one half of the expenses of the Court of Arbitration and of Her Britannic Majesty's Government in relation to the Arbitration.

ARTICLE XI

(1) Should any member of the Court of Arbitration die or become unable to act, the vacancy shall not be filled unless the Parties agree otherwise, and the proceedings shall continue as if such vacancy had not occurred.

(2) Should the Registrar die or become unable to act, the vacancy shall be filled by the Court of Arbitration, and the proceedings shall continue as if such vacancy had not occurred.

ARTICLE XII

(1) When the proceedings before the Court of Arbitration have been completed, it shall transmit its decision to Her Britannic Majesty's Government, which shall include the drawing of the boundary-line on a chart.

(2) The decision shall decide definitively each point in dispute and shall state the reasons for the decision on each point.

(3) The decision shall determine by whom, in what manner and within what time limit it shall be executed.

ARTICLE XIII

(1) If the decision referred to in Article XII is ratified by Her Britannic Majesty's Government, they shall communicate it to the Parties with a declaration that such decision constitutes the Award in accordance with the Treaty, and that Award shall be final in accordance with Articles 11 and 13 of the Treaty.

(2) The Award shall be communicated to each of the Parties by delivery to the London address of the Head of its Diplomatic Mission.

ARTICLE XIV

The Award shall be legally binding upon both the Parties and there shall be no appeal from it, except as provided in Article 13 of the Treaty.

ARTICLE XV

The Court of Arbitration shall not be *functus officio* until it has notified Her Britannic Majesty's Government that in the opinion of the Court of Arbitration the Award has been materially and fully executed.

ARTICLE XVI

The references to the Parties in alphabetical order in this Agreement (Compromiso) shall not imply precedence for any purpose whatsoever.

ARTICLE XVII

The Parties have informed Her Britannic Majesty's Government that they have accepted the terms of this Agreement (Compromiso).

In witness whereof this Agreement (Compromiso) has been signed by the duly authorized representatives of the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the Argentine Republic and the Government of the Republic of Chile.

Done at London the 22nd day of July, 1971, in the English and Spanish languages, both texts being equally authoritative, in a single original which shall be deposited in the archives of the Government of the United Kingdom, who shall transmit certified true copies to the Government of the Argentine Republic, to the Government of the Republic of Chile and to the Court of Arbitration.

RESOLUTIONS ADOPTED BY THE INSTITUT DE DROIT INTERNATIONAL AT ITS ZAGREB SESSION, 1971

I. CONDITIONS OF APPLICATION OF HUMANITARIAN RULES OF ARMED CONFLICT TO HOSTILITIES IN WHICH UNITED NATIONS FORCES MAY BE ENGAGED

(*First Commission*, Paul De Visscher, Rapporteur)

The Institute of International Law,

Recalling its Resolution on "Equality of application of the rules of the laws of war to the parties to an armed conflict" (Brussels Session, 1963);

Recalling its Resolution on "The distinction between military objectives and non-military objects in general and particularly the problems associated with weapons of mass destruction" (Edinburgh Session, 1969);

Noting that the United Nations on various occasions has made use of armed Forces and that such Forces, whatever their mission, might become involved in actual hostilities;

Considering that pending the elaboration of a comprehensive set of rules governing the status of United Nations Forces, it is necessary to determine the conditions under which the humanitarian rules of armed conflict apply to such Forces;

Reserving the study of the general problem of the effect which the outlawry of war and of the use of force may have upon the principle of non-discrimination in the application of the other rules relating to armed conflict;

Declaring, in addition, that the present Resolution is without prejudice to the solution which may be given to the problems connected with the competence of United Nations organs to create or to direct United Nations Forces;

Has adopted the following Articles:

Article 1

For the purposes of the present articles, the term "United Nations Forces" shall apply to all armed units under the control of the United Nations.

Article 2

The humanitarian rules of the law of armed conflict apply to the United Nations as of right, and they must be complied with in all circumstances by United Nations Forces which are engaged in hostilities.

The rules referred to in the preceding paragraph include in particular:

(*a*) the rules pertaining to the conduct of hostilities in general and especially those prohibiting the use or some uses of certain weapons, those concerning the means of injuring the other party, and those relating to the distinction between military and non-military objectives;

(*b*) the rules contained in the Geneva Conventions of August 12, 1949;

(*c*) the rules which aim at protecting civilian persons and property.

Article 3

A. If United Nations Forces are formed through individual recruitment, the United Nations shall issue regulations defining the rights and duties of the members of such Forces.

In the event of these Forces becoming involved in hostilities, these regulations shall name the international authorities which, in regard to said Forces, shall be vested with the regulatory, executive and judicial powers necessary to secure effective compliance with the humanitarian rules of armed conflict.

B. If United Nations Forces are composed of national contingents with regard to which the United Nations has not issued any regulations such as those mentioned in the preceding paragraph, effective compliance with the humanitarian rules of armed conflict must be secured through agreements concluded between the Organization and the several states which contribute contingents.

These agreements shall at least confer upon the United Nations the right to receive all information pertaining to, and the right to supervise at any time and at any place, the effective compliance with the humanitarian rules of armed conflict by each contingent.

Article 4

In order to secure effective compliance with the humanitarian rules of armed conflict by United Nations Forces, it is necessary that the individuals who may be called upon to participate in such Forces receive adequate and previous instruction on the law of armed conflict in its entirety, and especially on the meaning and the scope of the Geneva Conventions of August 12, 1949.

It is desirable that the United Nations, as well as those of its specialized agencies which are concerned with furthering education and health, take all steps within their power in order to co-ordinate the measures which the states parties to the Geneva Conventions have been invited to take in this field by the International Conferences of the Red Cross.

Article 5

In order to secure effective compliance with the humanitarian rules of armed conflict during hostilities in which United Nations Forces are engaged, it is necessary that the Organization should ensure that there are, within its Forces, health services composed of competent personnel in sufficient numbers and provided with means of action that are proportionate to the foreseeable needs.

If the direction of such services is entrusted to the states which have contributed contingents, the Organization shall take all measures in its power to co-ordinate the activities of these services.

Article 6

In order to ensure effective compliance with the humanitarian rules of armed conflict during hostilities in which United Nations Forces may become involved, it is desirable, if there is no Protecting Power, that an impartial body be empowered to assume the duties entrusted to the Protecting Power by the Geneva Conventions of August 12, 1949.

The body referred to in the present article as well as its members should enjoy the facilities necessary to carry out their functions effectively.

Article 7

Without prejudice to the individual or collective responsibility which derives from the very fact that the party opposing the United Nations Forces has committed aggression, that party shall make reparation for injuries caused in violation of the humanitarian rules of armed conflict. The United Nations is entitled to demand compliance with these rules for the benefit of its Forces and to claim damages for injuries suffered by its Forces in violation of these rules.

Article 8

The United Nations is liable for damage which may be caused by its Forces in violation of the humanitarian rules of armed conflict, without prejudice to any possible recourse against the state whose contingent has caused the damage.

It is desirable that claims presented by persons thus injured be submitted to bodies composed of independent and impartial persons. Such bodies should be designated or set up either by the regulations issued by the United Nations or by the agreements concluded by the Organization with the states which put contingents at its disposal and, possibly, with any other interested state.

It is equally desirable that if such bodies have been designated or set up by a binding decision of the United Nations, or if the jurisdiction of similar bodies has been accepted by the state of which the injured person is a national, no claims may be presented to the United Nations by that state unless the injured person has exhausted the remedy thus made available to it.

(*September 3, 1971*)

II. UNLAWFUL DIVERSION OF AIRCRAFT

(*Eighteenth Commission*, Edward McWhinney, Rapporteur)

The Institute of International Law,

Considering that acts of seizure or unauthorized exercise of control of aircraft in flight, jeopardizing the life and health of passengers and crew, as well as those of persons on the ground or in other aircraft, in disregard of elementary considerations of humanity, are unlawful under international law,

Considering that such unlawful acts may endanger international peace and friendly relations among states,

Considering that such unlawful acts jeopardize the freedom of international communications and seriously affect the operations of air services and undermine the confidence of the peoples of the world in the safety of civil aviation,

Having regard to the general condemnation of such unlawful acts expressed in the Resolutions of the General Assembly of the United Nations and of the International Civil Aviation Organization and of regional intergovernmental organizations,

I

Is of the opinion that no purpose or objective, whether political or other, can constitute justification for such unlawful acts, and that every state in whose territory the authors of such acts may be found has the right and the obligation, if it does not extradite such persons, to undertake criminal prosecution against them.

II

Notes that, among others, the following rules of international law apply:

1. Under the general rules of international air law, as expressed especially in the Chicago Convention of 7 December, 1944, states are required to ensure the safety, regularity and efficiency of international air navigation and to collaborate with each other to this end.

2. Under the general rules of international law which find particular expression in Articles 25 and 37 of the Chicago Convention of 1944, states are required to render assistance to aircraft in distress in their territory and to permit, subject to control by their own authorities, the owners of the aircraft or authorities of the state in which the aircraft is registered to provide such measures of assistance as may be necessitated by the circumstances.

3. Under general international law, states are required not to allow knowingly their territory to be used for acts contrary to the rights of other states.

Expresses the opinion that, in consequence, states must take all appropriate measures to give effect to these principles, notably by taking action:

(*a*) to prevent the accomplishment of acts of unlawful diversion of aircraft in flight, and

(*b*) in cases where an unlawfully diverted aircraft lands in their territory,

to restore control of the unlawfully diverted aircraft to its lawful commander or to preserve his control of the aircraft,

to permit the passengers and crew of the aircraft to continue their journey as soon as practicable,

to return the aircraft and its cargo to the persons lawfully entitled to possession,

to ensure the personal safety and human dignity of the passengers and crew until their journey can be continued.

III

Notes that the concern of states to resolve the problem of unlawful diversion of aircraft in flight received a first recognition by the adoption of the Convention on Offenses and Certain Other Acts Committed on Board Aircraft, signed at Tokyo on 14 September 1963 and in the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970.

Considers that, in ratifying these Conventions and in making all necessary dispositions to give effect to them, states will contribute to implementing and to rendering precise the obligations set out in this Resolution as well as to the progressive development of international law in these matters,

Emphasizes, in particular, the urgency for states to make such adaptations in their internal law as may be necessary to give effect to the principles contained in the above-mentioned Conventions.

IV

This Resolution does not prejudge in any way the question of the prevention and repression of all other acts of violence which may endanger the safety of air transport, nor the question of a more specific regulation of sanctions against states which fail to fulfil their international obligations in the matter of the unlawful diversion of aircraft in flight.

(*September 3, 1971*)

RESOLUTIONS ADOPTED BY THE INSTITUT DE DROIT INTERNATIONAL AT ITS SESSION AT EDINBURGH, 1969

I. THE DISTINCTION BETWEEN MILITARY OBJECTIVES AND NON-MILITARY OBJECTS IN GENERAL AND PARTICULARLY THE PROBLEMS ASSOCIATED WITH WEAPONS OF MASS DESTRUCTION

(*Fifth Commission*, Baron von der Heydte, Rapporteur)

The Institute of International Law,

Reaffirming the existing rules of international law whereby the recourse to force is prohibited in international relations,

Considering that, if an armed conflict occurs in spite of these rules, the protection of civilian populations is one of the essential obligations of the parties,

Having in mind the general principles of international law, the customary rules and the conventions and agreements which clearly restrict the extent to which the parties engaged in a conflict may harm the adversary,

Having also in mind that these rules, which are enforced by international and national courts, have been formally confirmed on several occasions by a large number of international organizations and especially by the United Nations Organization,

Being of the opinion that these rules have kept their full validity notwithstanding the infringements suffered,

Having in mind that the consequences which the indiscriminate conduct of hostilities and particularly the use of nuclear, chemical and bacteriological weapons, may involve for civilian populations and for mankind as a whole,

Notes that the following rules form part of the principles to be observed in armed conflicts by any *de jure* or *de facto* government, or by any other authority responsible for the conduct of hostilities:

1. The obligation to respect the distinction between military objectives and non-military objects as well as between persons participating in the hostilities and members of the civilian population remains a fundamental principle of the international law in force.

2. There can be considered as military objectives only those which, by their very nature or purpose or use, make an effective contribution to military action, or exhibit a generally recognized military significance, such that their total or partial destruction in the actual circumstances gives a substantial, specific and immediate military advantage to those who are in a position to destroy them.

3. Neither the civilian population nor any of the objects expressly protected by conventions or agreements can be considered as military objectives, nor yet

(*a*) under whatsoever circumstances the means indispensable for the survival of the civilian population,

(*b*) those objects which, by their nature or use, serve primarily humanitarian or peaceful purposes such as religious or cultural needs.

4. Existing international law prohibits all armed attacks on the civilian population as such, as well as on non-military objects, notably dwellings or other buildings sheltering the civilian population, so long as these are not used for military purposes to such an extent as to justify action against them under the rule regarding military objectives as set forth in the second paragraph hereof.

5. The provisions of the preceding paragraphs do not affect the application of the existing rules of international law which prohibit the exposure of civilian populations and of non-military objects to the destructive effects of military means.

6. Existing international law prohibits, irrespective of the type of weapon used, any action whatsoever designed to terrorize the civilian population.

7. Existing international law prohibits the use of all weapons which, by their nature, affect indiscriminately both military objectives and non-military objects, or both armed forces and civilian populations. In particular, it prohibits the use of weapons the destructive effect of which is so great that it cannot be limited to specific military objectives or is otherwise uncontrollable (self-generating weapons), as well as of "blind" weapons.

8. Existing international law prohibits all attacks for whatsoever motive or by whatsoever means for the annihilation of any group, region or urban centre with no possible distinction between armed forces and civilian populations or between military objectives and non-military objects.

(*September 9, 1969*)

III. MEASURES CONCERNING ACCIDENTAL POLLUTION OF THE SEAS

(*Twelfth Commission*, Juraj Andrassy, Rapporteur)

A. Prevention of Accidents

The Institute of International Law,

Conscious of the importance of the prevention of pollution of the seas,

Considering in particular the need to prevent any pollution caused by accidents occurring to ships which carry polluting materials,

Recognizing that it is in the interest of the international community and indeed of any state likely to be affected by the pollution of the seas that such accidents should be prevented,

Considering that appropriate measures to prevent such accidents as far as possible should be taken on a joint basis either by a multilateral agreement or through the action of an authorized body or, in the absence of such procedures, by the individual states concerned,

Adopts the following articles which might inspire the conduct of states in this matter:

I

All states must take appropriate measures to prevent pollution of the seas either individually or jointly under international agreements to be concluded, without ignoring the principle of freedom of the seas.

In the following articles are set forth the duties and rights of states to prevent pollutions caused by ships which carry polluting materials.

II

The measures referred to in Article I shall relate to the design and equipment of the ships, to the navigation instruments, to the qualifications of the officers and members of the crews, and to other significant factors.

They may also include traffic regulations in areas where such regulations are necessary and in particular provisions concerning the routes to be followed, the maximum speeds and the compulsory pilotage procedures.

III

States should co-operate in order to determine on a joint basis either by an international agreement or through an authorized body acting in accordance with its Statutes:

(*a*) the requirements set out in Article II,

(*b*) the state responsible for implementing each of these requirements.

IV

Nothing in Article III can be interpreted as preventing a state from enacting such measures within its competence as may be necessary to meet the obligations under Article I, pending the establishment of the rules contemplated by Article III, or in case the rules thus established should cover only part of the objectives mentioned in this Resolution.

V

Measures adopted under the preceding provisions:

(*a*) must remain within the strict limits of their final aim and lead to no discrimination in their implementation between means which may equivalently meet the safety requirements of navigation, and

(*b*) must be reported to the navigation authorities.

VI

States have the right to prohibit any ship that does not conform to the standards set up in accordance with the preceding articles for the design and equipment of the ships, for the navigation instruments, and for the qualifications of the officers and members of the crews, from crossing their territorial seas and contiguous zones and from reaching their ports.

VII

Any dispute concerning the application and interpretation of the preceding articles should be settled by a peaceful means agreed upon by the Parties. In the absence of such an agreement, or in the event of a failure of the means agreed upon, each Party might unilaterally resort to the means provided for to this end within the Inter-Governmental Maritime Consultative Organization. If such means do not succeed or are lacking, the Parties might resort to means agreed upon between themselves beforehand for the peaceful settlement of disputes. Finally, in the event of a failure or in the absence of such means, each Party should be entitled to refer the matter to the International Court of Justice by unilateral request.

B. Measures Following an Accident

The Institute of International Law,

Recognizing the need for clear and uniform rules of the exercise of the right to take efficient measures in order to prevent, mitigate or eliminate the danger of pollution of the seas by polluting materials arising from an accident,

Expresses the opinion that the state threatened by such danger is entitled to take appropriate measures proportionate to the likely danger,

Pays a tribute to the work undertaken within the Inter-Governmental Maritime Consultative Organizaiton with a view to drafting a Convention to this end,

Hopes that this task may be carried out as soon as possible with the participation of all states whose flags are flying on the seas,

Wishes to contribute to this work by setting forth the formulas which, in its opinion, express most accurately the main points of the Convention contemplated:

I

Any state facing grave and imminent danger to its coastline or related interests from pollution or threat of pollution of the sea, following upon an accident on the high seas, or acts related to such an accident, which may be expected to result in major consequences, may take such measures as may be necessary to prevent, mitigate or eliminate such danger.

II

Except for tankers, no measures shall be taken against warships or other ships owned or operated by a state and used only on government non-commercial service at the time considered.

III

Measures taken in accordance with Article I shall be proportionate to the damage which threatens the state concerned.

Such measures shall not go beyond what is reasonably necessary to achieve the aim mentioned in Article I.

They shall cease as soon as that aim has been achieved or as soon as it has become obvious that it cannot be achieved. They shall not unnecessarily interfere with the rights and interests of the flag state, third states and of any persons, physical or corporate, concerned.

In considering whether the measures are proportionate to the damage, account shall in particular be taken of:

(*a*) the extent and probability of imminent damage if such measures are not taken;

(*b*) the likelihood of such measures being effective;

(*c*) the extent of the damage which may be caused by such measures.

IV

Before taking any measures, a coastal state shall proceed to consultations with other states affected by the maritime accident, particularly with the flag state or states.

The coastal state also shall notify without delay the proposed measures to any persons, physical or corporate, known to have interests which can reasonably be expected to be affected by such measures. It shall take into account any views which those persons may submit.

In cases of urgency requiring measures to be taken immediately, the coastal state may take such measures as may be rendered necessary by the urgency of the situation, without prior notification or consultation or without continuing the current consultations.

Measures which have been taken shall be notified without delay to the states and to the known physical or corporate persons concerned.

V

It is desirable that a system of consultation with independent experts whom the coastal states may consult before taking the above-mentioned measures should be set up.

VI

Any state which has taken measures in contravention of the preceding provisions and has thus caused damage to others must pay compensation.

VII

Any controversy concerning the interpretation or application of the preceding provisions shall be settled by a peaceful means. The system to be provided for shall be such that in the event of a failure of the means used any Party may unilaterally resort to an arbitration or judicial procedure

which can be carried on and brought to a successful issue even if the other Party abstains from taking part in it.

(*September 12, 1969*)

INTERNATIONAL LEGAL MATERIALS

The following documents are reproduced in Vol. 11, No. 1 (January), 1972, of *International Legal Materials: Current Documents:* [1]

VOLUME XI, NUMBER 1 (JANUARY, 1972)

[1] The annual subscription for six numbers of International Legal Materials is $35.00; there is a concessionary rate of $15.00 for members of the American Society of International Law. Inquiries and orders should be directed to International Legal Materials, American Society of International Law, 2223 Massachusetts Avenue, N. W., Washington, D.C. 20008.

Leontin Constantinesco
Die unmittelbare Anwendbarkeit der Gemeinschaftsnormen und der Rechtsschutz von Einzelpersonen im Recht der EWG. 1969, 148 p., 22,– DM

Rainer Faupel
Tarifhoheit und völkerrechtliche Vertragserfüllungspflicht. 1969, 220 p., 28,– DM

Karl Gleichmann
Europäische Aktiengesellschaft. 1972, II. Quarter

Klaus Hanebuth
Das Auskunftsrecht im europäischen Wirtschaftsrecht. 1967, 397 p., 43,– DM

Rainer Hellmann
Wirtschafts- und Währungsunion nach dem Werner-Plan. 1972, 368 p., 60,– DM

Ferdinand Karl Liebich
Das GATT im Zentrum der internationalen Handelspolitik. 1971, 244 p., 28,– DM

K. Peter Mailänder
Zuständigkeit und Entscheidungsfreiheit nationaler Gerichte im EWG-Kartellrecht. 1965, 100 p., 14,50 DM

Heinrich Nagel
Nationale und internationale Rechtshilfe im Zivilprozeß. 1971, 283 p., 60,– DM

Dieter Pfaff
Die Außenhandelsschiedsgerichtsbarkeit der sozialistischen Länder im Handel mit der Bundesrepublik Deutschland. 1972

Josef Scherer
Die Wirtschaftsverfassung der EWG. 1970, 205 p., 32,– DM

Klaus-Heinrich Standke
Der Handel mit dem Osten. 2nd edition. 1972, 328 p., 65,– DM

Alexander Uschakow
Der Ostmarkt im COMECON. 1971. 496 p., 90,– DM

Handbuch für Europäische Wirtschaft
Continuation work in loose-leaf form about EWG, EFTA, Euratom, Montan-union, GATT, OECD, EWA, IWF, Weltbank, IFC, IDA, Europarat und ECE. Edited by: Hans von der Groeben and Hans von Boeckh.
Main work in 16 cloth-bound files, Size DIN A 5, containing more than 9,000 pages, 160,– DM, supplements 1,60 DM each brochure of 16 pages.

Steuren und Zölle im Gemeinsamen Markt
Edited by: Professor e.h. Dr. Rudolf Regul
Main work in 7 cloth-bound files, Size DIN A 5, 111,– DM, supplements –, 10 DM the page.

NOMOS VERLAGSGESELLSCHAFT
Baden-Baden • Postfach 610

REVIEWS OF BOOKS PUBLISHED RECENTLY UNDER THE AUSPICES OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW

The Vietnam War and International Law

Edited by Richard A. Falk; published by Princeton University Press, and Oxford University Press. These three volumes bring together essays of a wide variety of viewpoint and source, and are published under the auspices of the Society's Panel on the Rôle of International Law in Civil Wars. Volume III, $18.00, cloth; $7.50, paper

"This volume [I in the series] is immensely invaluable . . . imaginatively conceived and impressively executed."—*The Economist*

The International Law of Civil War

Edited by Richard A. Falk; published by The Johns Hopkins Press, Baltimore, Maryland 21218. The volume is a collection of case studies of civil wars, together with essays analyzing them, prepared under the auspices of the Society's Panel on the Rôle of International Law in Civil Wars. $15.00

"The essays are excellent and of particular value to all who are concerned with the laws of war or with the broader political context of what the major problems of maintaining international peace and security are all about."—*ABA Journal*

Foreign Enterprise in Mexico: Laws and Policies

By Harry K. Wright; published by the University of North Carolina Press, Chapel Hill, North Carolina 27514. This is the fourth of five studies on the legal environment for foreign investment, sponsored by the Society under a grant from the Ford Foundation. $15.00

"A broad inquiry into legal, institutional and social factors that constitute the environment for investment in Mexico."—*Foreign Affairs*

Nuclear Proliferation: Prospects for Control

Edited by Bennett Boskey and Mason Willrich; published by Dunellen Publishing Co., 145 East 52nd Street, New York, New York 10022. This is a volume of essays prepared by members of the Society's Panel on Nuclear Energy and World Order. $7.50

"This book makes an important contribution to public understanding of the scope of the [Non-Proliferation Treaty 1970] and the problem of nuclear proliferation."—*Perspective*

International Law and the Social Sciences

By Wesley L. Gould and Michael Barkun; published by the Princeton University Press, Princeton, New Jersey 08540. The authors have set forth and evaluated the relationship between international law and the social sciences in terms of the concepts and theories of both disciplines. $9.75

"This is a seminal book, well worth the close attention demanded of the reader by virtue of its scope and insights."—*Annals of the American Academy of Political and Social Science*

International Telecommunications and International Law: The Regulation of the Radio Spectrum

By David M. Leive; published by A. W. Sijthoff, Leiden, The Netherlands; and Oceana Publications, Inc., Dobbs Ferry, New York 10522. This is a study of the regulatory regime of the International Telecommunication Union, which examines its historical evolution and analyzes its structure, powers and procedure, including the rights and obligations of its 125 members. $16.50

"Without precedent in the area studied, the work represents a contribution of exceptional quality for all specialists in this subject."—*Revue Generale de droit international public*

Orders should be placed directly with the publisher or through your bookstore.

OCEANA PUBLICATIONS, INC.

Looking toward the 21st century, presents a distinguished group of co-publishers . . .

* AMERICAN SOCIETY OF INTERNATIONAL LAW
* BRITISH INSTITUTE OF INTERNATIONAL AND COMPARATIVE LAW
* CAMBRIDGE UNIVERSITY
* CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE
* HARVARD LAW SCHOOL LIBRARY
* HEYMANNS VERLAG, CARL KG
* INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE INTERNATIONAL LAW (UNIDROIT)
* LONGMAN GROUP LIMITED
* MOHR, J. C. B. (SIEBECK)
* MOUTON & CO.
* NATIONAL ASSOCIATION OF CREDIT MANAGEMENT
* NEW YORK UNIVERSITY SCHOOL OF LAW
* PARKER SCHOOL OF FOREIGN & COMPARATIVE LAW
* SIJTHOFF, A. W.
* UNITED NATIONS/LEAGUE OF NATIONS
* OCEANA PUBLICATIONS, INC., MAJOR SETS

The materials which follow in large measure reflect the accomplishments of the late

DR. FRANCIS DEAK

who served for many years as OCEANA's adviser on international law. In recognition of the deep loss occasioned by his passing, OCEANA and the co-publishers herein represented dedicate this catalog in tribute to him.

As a giver of knowledge through his lifetime, let this storehouse of knowledge be a memorial to him.

HARGROVE, JOHN LAWRENCE, Ed. *Law, Institutions and the Global Environment.* 379-00024-5 LC# 72-1153 (cip) approx. 450 pp. 1972 $20.00 (tent.)/B

Papers of a conference of legal advisers of international organizations and selected governments on institutional and legal problems of the global environment, together with an analysis of conference discussions.

RUBIN, SEYMOUR J., Ed. *Foreign Development Lending: Legal Aspects.* 379-00129-2 352 pp. 1971 $18.20/B

Papers and proceedings of the conference of legal advisers of national and international institutions on legal problems of foreign lending and assistance.

SCHWEBEL, STEPHEN M., Ed. *The Effectiveness of International Decisions.* 379-00462-3 538 pp. 1971 $19.50/B

The papers and proceedings of a conference of official legal advisers on the problem of how decisions of international organizations may be rendered more effective.

LEIVE, DAVID M. *International Telecommunications and International Law: The Regulation of the Radio Spectrum.* 379-00458-5 386 pp. 1970 LC# 74-114161 $16.50/B

The first detailed examination of an increasingly significant but hitherto neglected subject.

MEMILLAT, H. C. L., Ed. *Legal Advisers and International Organizations.* 379-00294-9 142 pp. 1966 LC# 66-20029 $4.00/B

A discussion of problems which arise in the practice of legal offices of international organizations.

MEMILLAT, H. C. L., Ed. *Legal Advisers and Foreign Affairs.* 379-00223-X 176 pp. 1964 LC# 64-19355 $4.25/B

The actual and potential roles and functions of international legal advisers to governments.

MANUAL OF GERMAN LAW, VOLS. I & II. Edited by E. J. COHN. Vol. I—379-00296-5, $15; Vol. II—379-00297-3, $16. The set of both volumes—$30. LC# 67-28195 (applies to both volumes).

Vol. I describes the structure and history of the German legal system and outlines German legal literature. This is followed by an analysis of the civil law of the Federal Republic. An index of German technical terms and a subject index are also included.

Vol. II covers Commercial Law, Civil Procedure, Conflict of Laws, Bankruptcy, Law of Nationality, East German Family Law. A list of abbreviations, glossary of German terms, a table of English cases cited and an alphabetical subject index are included.

GROTIUS SOCIETY TRANSACTIONS, VOLS. 1–45 (1915–1959). Single volumes $15; the complete set $500; Index (Vol. 45) pub. 1968, $15. 379-20500-9 LC# 16-15222.

These transactions of the Grotius Society (formed in 1915 for the purpose of study, discussion and advancement of public and private international law) include contributions by the leading authorities in the field.

Publications Sponsored by The British Institute of International and Comparative Law

BRITISH INTERNATIONAL LAW CASES. Edited by Clive Parry. 379-14020-9 LC# 63-22348. Published by OCEANA and SWEET & MAXWELL.

This monumental collection of British court cases setting forth and interpreting international law was prepared under the auspices of the British Institute and the International Law Fund. Its eight volumes contain more than 7,500 pages of cases.

Vol.	I: $21	Vol.	V: $26
Vol.	II: $30	Vol.	VI: $32
Vol.	III: $29	Vol.	VII: $32
Vol.	IV: $29.50	Vol.	VIII: $35

UNIVERSITY OF CAMBRIDGE

OCEANA

CATALOGUE OF INTERNATIONAL LAW *The Squire Law Library* Steiner, W. A. F. P. 379-20030-9 4 vol. set LC# 71-147816 $50 per vol.—the set $200/X

A reproduction of the computer print-out done by the Squire Law Library—represents a new classification scheme, completely covering the international law collection of the library.

CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE

OCEANA

CARNEGIE CLASSICS OF INTERNATIONAL LAW 379-20001-5 $2 vols. (temporarily out-of-print)

The most important treatises on international law from the 15th to the 20th century. Includes works by AYALA, BELLI, BYNKERSHOEK, GENTILI, GROTIUS, LEGNANO, PUFENDORF, RACHEL, SUÁREZ, TEXTOR, VATTEL, VICTORIA, WHEATON, WOLFF and ZOUCHE.

HUDSON, MANLEY *International Legislation* 379-20110-0 9 vols. (approx.) 750–800 pp. per vol. $50.00/X per vol.—the set—$400.50

A collection of the texts of multipartite international instruments of general interest. Begins with the Covenant of the League of Nations.

HUDSON, MANLEY, ed. *World Court Reports* 397-00428-3 379-00429-1 (Vol. 1); 379-00430-5 (Vol. 2); 379-00431-3 (Vol. 3); 379-00432-1 (Vol. 4) $50 per vol.—the set—$140.00

A collection of the judgments, orders and opinions of the Permanent Court of International Justice. Included are tables, lists and indices.

A REPERTOIRE OF LEAGUE OF NATIONS DOCUMENTS, 1919–1947 379-00371-6 500 pp. $50.00 Victor-Yves Ghebali, Ed.

Table of contents includes: Foreword; Introduction; The Classification System of League of Nations Documents; Survey of the Classification System. Part 1: Institutional Framework of the League; Part 2: The League as an Instrument for the Application of the Peace Treaties; Part 3: The League as an Instrument to Maintain International Peace and Security; Part 4: The League as an Instrument to Promote Functional Cooperation.

HARVARD LAW SCHOOL LIBRARY

OCEANA

CATALOG OF INTERNATIONAL LAW AND RELATIONS 379-20003-1 LC# 65-23603 20 vols. 1965–1967 $1,000/D

A comprehensive bibliography of international law and related subjects representing the complete holdings of the Library's collection.

INDEX TO MULTILATERAL TREATIES 379-00272-8 302 pp. 1935 $13.75/C

A chronological list of multi-party international agreements from the sixteenth century through 1963, with citations to their text.

CARL HEYMANNS VERLAG KG

Editor: Professor MOSLER, Director Max-Planck-Institute for Comparative Public Law and International Law—Heidelberg

JUDICIAL PROTECTION AGAINST THE EXECUTIVE

3 vols. (*sold only as a set*). Vols. 1 and 2 with reports in English, German or French, Vol. 3 in two editions, English and German. The set with Vol. 3 in English can be purchased only from Oceana (*with Vol. 3 in German only from* Carl Heymanns KG, D-5000 Köln 1, Germany).

379-00437-1 LC# 77-94691 the set—$75.00

Legal experts from 32 countries, the European Communities and International Organizations submitted detailed reports (*Vols. 1 and 2*). Comparative studies on different topics point out common standards, general principles of law and minimum standards of international law (Vol. 3).

THE INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW (UNIDROIT)

DIGEST OF LEGAL ACTIVITIES OF INTERNATIONAL ORGANIZATIONS AND OTHER INSTITUTIONS 379-00388-0 450 pp. 1969 $30.00/X

English/French loose-leaf publication covering the different phases of development of all legal activities by international organizations on private and public law, criminal and administrative law, taxation, civil and criminal procedures.

YEARBOOK 1926–1955 in 4 vols. (2nd vol. out of print)—$37.50/C—1956–1969 in 15 vols.—$126.00/C Standing order—annual—$10.00/C

English/French survey of the activity of the Institute including special studies on unification of the law, draft conventions, international conventions, plus bibliography on the field of the unification of the law. 1970 and 1971 under press.

UNIFORM LAW CASES 1959–1970—$137.50 (in paper) annual subscription 4 issues per year, 1971—$12.50/C

English/French periodical containing selected decisions by various national courts in the application of international uniform law, such as Geneva conventions, Warsaw convention, Maritime conventions, etc.

PROCEEDINGS AND PAPERS Microfilm edition, approx. 40,000 pages—$1,350.00/X

Covers the activity of the Institute from 1928–1965.

Supplement under preparation 1966–1970.

INDEX TO PROCEEDINGS AND DOCUMENTS 379-00460-7 74 pp. 1967 $6.00/B Prepared and printed by the Harvard University Law School Library.

LONGMAN GROUP LIMITED

CAMPBELL, ALAN *Common Market Law,* 2nd ed., 1969, 2 vols. 2 supplements (1970, 1971) 379-16060-9 LC# 75-80747 Complete set plus 2 supplements $95.60/C

The two volumes are intended to provide an introductory reference work on the exposition of Common Market Law. Some emphasis is on the Rome Treaties, but the author also takes into account the growing body of case law which is being built up within the community. The Supplements replace old materials as necessary.

J. C. B. MOHR (SIEBECK), MOUTON AND COMPANY

INTERNATIONAL ASSOCIATION OF LEGAL SCIENCE

(editors: David—Paris; Graveson—London; Knapp—Prague; v. Mehren—Cambridge; Tschikvadze—Moscow; Valladão—Rio de Janeiro; Zweigert—Hamburg)

INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW

379-20150-x est. 17 vols. approx. 1,000 pp. per vol. lexicon format. Price per vol. $95 (includes set of advance edition).

The aim of this encyclopedia is the comparison of the more important legal rules and institutions governing private and commercial intercourse on a world-wide basis. Personnel and working methods are international in the broadest sense.

DIGEST OF COMMERCIAL LAWS OF THE WORLD

LC# 65-22163 4 loose-leaf binders, including Forms of Contracts . . . all material published to date with subscription service to May 1, 1973—$235.00. A guide, updated quarterly, for doing business in world markets.

Prepared by legal experts within each nation, this service brings together, for the first time, in concise layman's language the commercial laws important in international trade.

Reviewed and praised by some 50 authoritative periodicals including—International and Comparative Law Quarterly, Commercial Law Journal and the American Bar Association Journal.

This is an unprecedented endeavor to help the international businessman, attorney and banker by providing a basis for negotiation between parties in different jurisdictions.

CURRENTLY COVERS 65 IMPORTANT COUNTRIES INCLUDING ALL MAJOR SOCIALIST COUNTRIES. OTHERS WILL BE ADDED AS THEY GROW IN IMPORTANCE IN WORLD TRADE.

PATENTS AND TRADEMARKS All material published to date plus subscription service to May 1, 1973 ..... $75.00

Specialists in the field were selected in each country to compile this compendium of patent and trademark laws. This book has been acclaimed as the best in its field. From the TRADEMARK REPORTER —

> "... it would appear that there are few superior works available to the trademark lawyer working intensively in particular countries. The unique combination of a summary of general commercial law and trademark and patent law in a single reference set makes this an extremely attractive choice for the company doing business abroad."

Contains comprehensive summaries from more than 60 countries and every country appearing in the DIGEST OF COMMERCIAL LAWS OF THE WORLD will also appear in PATENTS AND TRADEMARKS.

ANNUAL SURVEY OF AMERICAN LAW LC #46-30523 Subscription—$15.00 a year. Set of 30 vols. $427.50/C 10 vols. 1961–1970/71 inclusive $130.00/C

Designed for the lawyer, professor or informed layman in search of analytical, perceptive and accurate account of the year's legal work by the courts and legislatures.

KLEIN, FANNY J. *Judicial Administration and the Legal Profession: A Bibliography* 379-00153-5 LC #62-12025 672 pp. 1963 $33.50/B

The most informative access to the valuable literature on judicial administration. Jurisdictional as well as subject divisions are made and the indexes include author as well as jurisdictional approach.

KLEIN, FANNY J. & LEE, J. S., eds. *Selected Writings of Arthur T. Vanderbilt.* 2 vols. 379-00226-4 LC #65-14216 512 pp. 1966 $17.50/B

Called by the AMERICAN BAR ASSOCIATION JOURNAL "a veritable gold mine of material of lasting value in (the) varied aspects of the law and its administration."

VANDERBILT, A. T. *Studying Law, 2nd ed.* 379-00097-0 LC #55-7147 753 pp. 1955 $10.00/B

A valuable collection of the distilled thoughts of famous legal minds, emphasizing the fundamentals that define a lawyer's basic attitude towards the legal profession and society's claim upon him.

PARKER SCHOOL OF FOREIGN AND COMPARATIVE LAW COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK

OCEANA PUBLICATIONS INC.

BAECK, P. L., transl. *The General Civil Code (Austrian Civil Code)* SBN: 379-00025-3 224–256 pp. (approx.) Price to be announced.

Translation from the German edition of 1966 by use of the Winiwarter translation of 1866; revised, brought up to date and annotated.

BLAUSTEIN, A. P. *Manual on Foreign Legal Periodicals and Their Index* SBN: 379-00119-5 148 pp. 1962 $10.75/B LC #62-11757

A ready-reference manual, with topical breakdowns, bibliographical tables and other aids.

CATTAN, H. *Evolution of Oil Concessions in the Middle East and North Africa* SBN: 379-00318-X 190 pp. 1967 $8.00/B LC #67-14399

Pertinent features of oil concessions and the changes in these agreements since the beginnings of the oil industry.

CATTAN, H. *The Law of Oil Concessions in the Middle East and North Africa* SBN: 379-00319-8 224 pp. 1967 $8.00/B LC #67-14400

Review of the special considerations affecting state contracts in general—legal rules and principles—procedures for settlement of disputes.

DAVID, R. & de VRIES, H. P. *The French Legal System: An Introduction to Civil Law Systems* SBN: 379-00043-1 1958 152 pp. $5.50/B LC #58-9194

French legal tradition—structure of French law—formulation of rules of law, their sources and application in deciding disputes.

DELAUME, G. R. *Legal Aspects of International Lending and Economic Development Financing* SBN: 370-00322-8 371 pp. 1967 $15.75/B LC #67-10694

A comprehensive study of theory and practice in the field of international financial loans and economic development loans; a manual for the lawyer and the international banker.

de VRIES, H. P. & RODRIGUEZ-NOVÁS, J. *The Law of the Americas: An Introduction to the Legal Systems of the American Republics* SBN: 379-00268-X 1965 352 pp. $15.75/B LC #65-27792

Emphasis on public law—the treaty structure, legal tradition and methods and techniques of legal development in Latin America.

FARNSWORTH, E. A. *An Introduction to the Legal System of the United States* SBN: 379-00108-X 184 pp. 1963 $6.50/B LC #63-19589

Brief, comprehensive treatment of the fundamentals of American law: its sources, techniques, organization and substance. Designed especially for the foreign lawyer.

HAZARD, J. N., SHAPIRO, I. & MAGGS, P. B. *The Soviet Legal System: Contemporary Documentation and Historical Commentary* SBN: 379-00127-6 687 pp. rev. ed. 1969 $17.50/B LC #70-85478

Examines the relationship between the Soviet state and its citizens, both before and after the Stalin era; the administration of Soviet socialism; and the private legal rights and obligations of Soviet citizens.

PARKER SCHOOL OF FOREIGN AND COMPARATIVE LAW COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK

LISSITZYN, O. J. *International Law Today and Tomorrow* SBN: 379-00242-6 1965 144 pp. 34.50/B LC #65-22165

Puts the role and function, the limits and potentialities of international law into modern perspective.

NUSSBAUM, A. & GALSTON, N. M., eds. *Bilateral Studies in Private International Law*

No. 1: NUSSBAUM, A. *American-Swiss* 2nd ed. SBN: 379-11401-1 94 pp. 1958 LC #58-13617

No. 2: DELAUME, G. R. *American-French* 2nd ed. SBN: 379-11402-X 221 pp. 1961 LC #61-13055

No. 3: KOLLEWIJN, R. D. *American-Dutch* 2nd ed. SBN: 379-11403-8 111 pp. 1961 LC #61-18187

No. 4: DROBNIG, U. *American-German* 2nd ed. SBN: 379-11418-6 approx. 500 pp. 1972 LC #79-132281

No. 5: EDER, P. J. *American-Colombian* SBN: 379-11405-4 95 pp. 1956 LC #56-8273

No. 6: EHRENZWEIG, A. A., FRAGISTAS, C. & YIANNOPOULOS, A. *American-Greek* SBN: 379-11406-2 111 pp. 1957 LC #56-8413

No. 7: PHILIP, A. *American-Danish* SBN: 379-11407-0 80 pp. 1957 LC #57-6015

No. 8: COWEN, Z. *American-Australian* SBN: 379-11408-9 108 pp. 1957 LC #57-13050

No. 9: GARLAND, P. G. *American-Brazilian* SBN: 379-11409-7 125 pp. 1959 LC #59-8602

No. 10: ETCHEBERRY, O. A. *American-Chilean* SBN: 379-11410-0 96 pp. 1960 LC # 60-16610

No. 11: SEIDL-HOHENVELDERN, I. *American-Austrian* SBN: 379-11411-9 220 pp. 1963 LC #62-20879

No. 12: EHRENZWEIG, A. A., IKEHARA, S. & JENSEN, N. *American-Japanese* SBN: 379-1141407 176 pp. 1964 LC #63-19600

No. 13: NIAL, H. *American-Swedish* SBN: 379-1141305 111 pp. 1965 LC #64-25226

No. 14: LOMBARD, R. S. *American-Venezuelan* SBN: 379-11414-3 128 pp. 1965 LC #65-20284

No. 15: GOLDSCHMIDT, W. & RODRIGUEZ-NOVÁS, J. *American-Argentine* SBN: 379-11415-1 118 pp. 1966 LC #66-17537

No. 16: ANSAY, T. *American-Turkish* SBN: 379-11416-X 106 pp. 1966 LC #66-17535

No. 17: van HECKE, G. *American-Belgian* SBN: 379-11417-8 128 pp. 1968 LC #68-21377

These are practical guides to the legal relations of individuals in the international sphere. All volumes are priced at $7.50 except no. 4, which is priced at $17.50.

REESE, W. L. M., ed. *International Contracts: Choice of Law and Language* SBN: 379-00126-8 79 pp. 1962 $5.50/B LC #62-20102

Thirtieth anniversary symposium of the Parker School, devoted to an analysis of problems of choice in the various types of international contract.

SOMMERICH, O. C. & BUSCH, B. *Foreign Law: A Guide to Pleading and Proof* SBN: 379-00109-8 170 pp. 1959 $5.50/B LC #59-8604

The technical aspects of foreign law in litigation, with emphasis on New York law and side glances at the law of other states and foreign countries.

SZLADITS, C. *A Bibliography on Foreign and Comparative Law: Books and Articles in English* LC #55-11076 Vol. 1 (to 1953) SBN: 379-14041-1 508 pp. 1955—Vol. 2 (1953-1959) SBN: 379-14042-X 584 pp. 1962—Vol. 3 (1960-1965) SBN: 379-14043-8 879 pp. 1968—Supplement (1966-1967) 242 pp. 1970; Supplement (1968) 240 pp. 1971; Supplement (1969) 207 pp. 1972. Volumes are priced at $30.00 each, supplements at $12.50 for 1966-1967 and $13.50 for 1968 and 1969.

Comprehensive collection of materials with annotations as to contents of more important works; geographical index and index of authors.

SZLADITS, C., ed. *Guides to Foreign Legal Materials* LC #59-8608

GRAULICH, P. et al. *Belgium, Netherlands, Luxembourg* SBN:379-11753-3 272 pp. 1968 $11.50/B

GRISOLI, A. *Italian* SBN: 379-11752-5 288 pp. 1965 $12.00/B

SZLADITS, C. *French, German, Swiss* SBN: 379-11751-7 599 pp. 1959 $15.75/B

Guides designed for the common-law lawyer—sources, court organization and legal literature, and advice on use of the materials.

WEISSBERG, G. *The International Status of the United Nations* SBN: 379-00107-1 228 pp. 1961 $8.00/B LC #60-16615

The international legal personality of the United Nations; its powers, privileges and immunities, and its role in international conflicts.

BOT, B. R. *Non-Recognition and Treaty Relations Acknowledgment* 379-00373-2 301 pp. 1968 $11.50/B

The author examines the legal arguments for non-recognition, as well as the area of treaties and the role of the non-recognized state in treaty participation.

DICKIE, ROBERT B. *Foreign Investment: France—A Case Study* 379-00390-2 LC# 72-97988 135 pp. $6.50/B

This book is the result of independent research conducted by the author into the conditions under which France will permit new direct American investment.

EHRENZWEIG, ALBERT A. *Psychoanalytic Jurisprudence—On Ethics, Aesthetics, and "Law"—on Crime, Tort and Procedure* 379-00137-3 LC# 70-140556 396 pp. $19.40/B

An exploration of the perennial debate between those primarily concerned with justice and those primarily concerned with law manifesting itself as a thinly disguised debate over license versus discipline.

GAL, GYULA *Space Law* 379-00290-6 LC# 68-9509 320 pp. 1969 $12.50/B

The author deals with man's relation to space as space exploration continues to grow in volume and importance; international space law and the uses of outer space as they affect the rights of individuals; and air sovereignty.

HARGROVE, JOHN LAWRENCE, Ed. *Law Institutions and Global Environment* 379-00024-5 LC# 72-1153 (cip) approx. 450 pp. 1972 $20.00 (tent.)/B

(See: American Society of International Law)

KAUFMANN, JOHAN *Conference Diplomacy—An Introductory Analysis* 379-00374-0 LC# 68-26727 222 pp. 1968 $8.00/B

A comprehensive outline of the significant elements of conference diplomacy.

LEIVE, DAVID M. *International Telecommunications and International Law: The Regulation of the Radio Spectrum* 379-00458-5 LC# 74-114161 1970 386 pp. $16.50/B

(See: American Society of International Law)

McWHINNEY, EDWARD *Aerial Piracy and International Law* 379-00038-5 LC# 78-161940 1971 213 pp. $9.25/B

Covers all aspects of this ever-increasing problem—from legislation and enforcement of such, to Human Rights and the right of asylum.

McWHINNEY, EDWARD & BRADLEY, MARTIN A. *New Frontiers in Space Law* 379-00389-9 LC# 73-91325 1969 $6.50/B

Collection of essays concerning the future of international cooperation in space, prepared by jurists drawn from all the major competing political and social systems of the present-day world community.

McWHINNEY, EDWARD, Ed. *The International Law of Communications* 379-00138-1 LC# 73-140557 172 pp. 1971 $7.50/B

Covers all aspects of the subject, ranging from the development of an international communications law to the contributions of telecommunications and direct satellite broadcasting as visualized by various countries.

McWHINNEY, EDWARD & BRADLEY, MARTIN A. *The Freedom of the Air* 379-00372-4 LC# 68-56077 1969 260 pp. $8.50/B

A unique collection of papers prepared by top specialists in International Law in general and the Law of the Air in particular.

ROSENNE, SHABTAI *Law of Treaties—A Guide to the Legislative History of the Vienna Convention* 379-00464-X LC# 74-131422 444 pp. 1971 $25.00/B

Quote from Secretary-General U Thant—"History will surely prove this Convention to be one of the most significant ever adopted in the course of the progressive development and codification of international law."

ROSENNE, SHABTAI *The World Court* 379-00099-7 LC# 62-9743 230 pp. 1962 $7.50/B

This book traces the evolution of the World Court—outlines its organization and describes its procedures.

RUBIN, SEYMOUR J., Ed. *Foreign Development Lending—Legal Aspects* 379-00129-2 LC# 73-161939 352 pp. 1972 $18.20/B

(See: American Society of International Law)

SCHWEBEL, STEPHEN M., Ed. *The Effectiveness of International Decisions* 379-00462-3 LC# 76-140512 538 pp. 1971 $19.50/B

(See: American Society of International Law)

WILLIAMS, WALTER L., Jr. *Intergovernmental Military Forces and World Public Order* 379-00063-6 LC# 75-167280 718 pp. 1972 $19.40/B

Starting with international military cooperation from early history to World War II, this study delves into all aspects of the complexities of intergovernmental military forces.

AMERICAN INTERNATIONAL LAW CASES

Compiled and edited by Francis Deak, Rutgers—The State University

A collection of American Federal and State Court decisions involving questions of public international law during the period from 1783 through 1968. The task was undertaken by Professor Francis Deak, Professor of International Law at Rutgers Law School, Camden, N. J.

Until now, the thousands of cases interpreting and applying international law (whether customary or treaty law), are scattered among tens of thousands of Federal and State reports and the volumes of the National Reporter System. Now this collection makes available to the community of international legal scholars the significant American international law decisions of the past 185 years. The decisions are annotated where appropriate—especially with precise identification of and citation to treaties which underlie the majority of the cases. Interim indexes will be published, and a cumulative index will appear when the set is complete.

SBN: 379-20075-9 LC #78-140621

4 vols. available $40. per volume

8-10 volumes projected

BASIC DOCUMENTS OF AFRICAN REGIONAL ORGANIZATIONS

Edited by Louis B. Sohn, Bemis Professor of International Law, Harvard University, and Counselor on International Law, United States Department of State.

This 4 volume set is a unique collection of annotated documents dealing with the development of regional organization in Africa.

All basic agreements, as well as subsidiary rules of procedure of all African regional organizations are reproduced in English or French. Each chapter contains introductory notes setting forth the historical and political events from which the organization emerged and the various states of development, activities and action of each. An extensive bibliography follows each introductory note, providing references to official sources of basic and supplementary documents, books and treatises, articles and periodicals, and including works in English, French, German and Italian.

The main sub-divisions in the approximately 1800-page manuscript are:

Organization of African Unity

The African Development Bank

Regional Groups in French-Speaking Africa

Regional Cooperation in West Africa

The Maghreb Permanent Consultative Committee

The East African Organizations

The Association of African States with the European Economic Community.

Published under the auspices of the Inter-American Institute of International Legal Studies Washington, D. C.

SBN: 379-00361-9 LC #72-141326

2 vols. available $35. per volume

4 volumes projected

THE CONSOLIDATED TREATY SERIES, 1648–1918

Edited and annotated by Clive Parry, LL.D., Cambridge University

The Consolidated Treaty Series begins with the year 1648, the year of the Treaties of Muenster and Osnabrueck which established the European system of states. It terminates in 1918, with the advent of the *League of Nations Treaty Series.*

The Series reproduces treaties concluded between 1648 and 1918 from numerous earlier series and, in some cases, from original documents in government archives. It represents the first attempt to consolidate in a single collection all available treaties over this 270-year period.

An essential feature is the annotations which cover detail as to the parties to a given treaty, its termination or continued effect, and its continuing relevance. Where the original language is neither English nor French, either a contemporary translation or a summary in English of the main treaty provisions is furnished.

The Series is sponsored by the Council of Europe, British Institute of International and Comparative Law and the American Society of International Law.

SBN: 379-13000-9 LC #70-76750

100 plus volumes projected $40. per volume

40 volumes now published

CONSTITUTIONS OF THE COUNTRIES OF THE WORLD
Permanent Loose-Leaf Edition

Compiled with Chronologies and Bibliographies by ALBERT P. BLAUSTEIN, Rutgers-Camden Law School and GISBERT FLANZ, New York University

Projected as a ten-volume loose-leaf set, the service will be regularly updated to reflect constitutional changes and to permit the inclusion of new and revised constitutions. The end product will be the only permanent and continuous research and information service on the constitutions of all countries.

Volume I consists of a loose-leaf binder, together with approximately 1,000 pages of material covering the constitutions of: Ecuador, Fiji, Gambia, Ghana, Korea, Malawi, Malta, Paraguay, Turkey, Uruguay, Western Samoa, and Yugoslavia. Now available.

So that payment may be equated with issue of material, the set is priced at $5.75 per Constitution (only full issues of material may be ordered). This includes not only the constitution itself and the attendant annotative material, but binders as they become necessary and all supplementary and revised material as it is issued until the set is complete. (Such supplementary and revised material will be issued as needed, so that each constitution is kept up-to-date on a continuing basis.)

SBN: 379-00467-4 Vols. 1, 2, 3—$69.00 each including binder

ITALIAN PRACTICE IN INTERNATIONAL LAW 1861–1942

Compiled by The Italian Society for International Organization, under the general editorship of Professor Roberto Ago.

Following a model proposal of the Council of Europe, the Italian Society began about five years ago to compile all the Italian diplomatic papers in the Italian Foreign Office, with a view to publishing this Digest. It will furnish a detailed picture of Italian international law practice from the birth of the Italian State till the end of the Second World War. Many of the papers have never been previously published.

Ten volumes are projected for the series. Text is in Italian, although for future volumes, headnotes will be in both Italian and English. Index is in English-French-Italian.

SBN: 379-10000-2 LC #79-147818

Vols. I, II available. $25.00 per volume

UNITED NATIONS/LEAGUE OF NATIONS

OCEANA PUBLICATIONS INC.

LEAGUE OF NATIONS AND UNITED NATIONS MONTHLY LIST OF SELECTED ARTICLES—Cumulative 1920–1970

379-14150-7 LC #75-147817 Projected at 15 vols. $50 per vol. Vols. 1, 2, 3, 4 available

This set, a reproduction of the card file in the UN Library in Geneva, will cover 50 years of periodical articles in the fields of international, constitutional and administrative law—politics and economics. Contains chronologically listed entries by subject and country, extracted from some 3,000 periodicals emanating from most countries of the world.

ROSENNE, SHABTAI *League of Nations Committee of Experts for the Progressive Codification of International Law*

379-00147-0 LC #77-165998 2 vols. approx. 480 pp. per vol. The set—$50.00/X

Reports and minutes of the meetings of the Committee for the Progressive Codification of International Law. The republication of this material will constitute a contribution to the historic background of the evolution of codification concepts of international law.

LEAGUE OF NATIONS TREATY SERIES
and
General Indexes to the Treaty Series

A collection of multilateral and bilateral treaties registered with the League of Nations from 1918 to 1945, when the *United Nations Treaty Series* begins. Treaties are printed in both English and French. Where original language was other than these two, text also appears in the original.

SBN: 379-13200-1 $2,500. the set/D

205 volumes, 9 index volumes (Library-bound)

The combination of the *Consolidated Treaty Series*, the *League of Nations Treaty Series* and the *United Nations Treaty Series* (both available from Oceana) offers the totality of treaties entered into by national states from the beginnings of modern times to the present.

League of Nations Documents

Oceana Publications has acquired the total holdings of the League of Nations Depository in Geneva. Write for listing.

Membership Secretary
American Society of International Law
2223 Massachusetts Avenue, N.W.
Washington, D.C. 20008

Please enroll me as a member of the American Society of International Law. My check, money order, UNESCO coupon, or payment in a convertible currency, is enclosed. I have checked the category of membership for which I am eligible:

[ ] PROFESSIONAL MEMBERS (U.S. residents practicing law other than in government who have been members of the bar for more than 10 years) ..... $ 40

[ ] RESIDENT REGULAR MEMBERS—residing in the United States ..... $ 25

[ ] NON-RESIDENT MEMBERS—not residing in the United States ..... $ 10

[ ] INTERMEDIATE MEMBERS (first 5 years of membership for *those under 30 years of age* at time of application) .. $ 15

[ ] STUDENT MEMBERS ..... $ 7.50

[ ] CONTRIBUTING MEMBERS ..... $ 50

[ ] SUPPORTING MEMBERS ..... $ 100

[ ] ANNUAL PATRON ..... $ 500

[ ] LIFE $1,000

(Please Print)

Name .....

Mailing Address .....

..... Zip .....

Professional Affiliation: .....

Nationality .....

Particular professional interests: .....

Signature .....

PLEASE MAKE CHECKS PAYABLE TO *The American Society of International Law.* Contributions above obligatory dues, and all dues if membership is related to your work or profession, are tax deductible in the United States.

Please enter my subscription for the Journal at $30 a year ..... [ ]

International Legal Materials

Cumulative Index, 1962-1969

The first *Cumulative Index* for *International Legal Materials* is now in print. Prepared by a scholar and practitioner of international law, Arnold Fraleigh, the 131-page *Cumulative Index* indexes all documents reproduced in *International Legal Materials* in the years 1962–1969.

The specifics of contemporary practice—the raw material of international law as it is produced by the activities of states, international organizations, and others—can be found in the form of primary documents in *International Legal Materials,* as in no other source. The *Cumulative Index* makes this data available with greater ease, accuracy and comprehensiveness. As is *International Legal Materials* itself, the *Cumulative Index* is an indispensable tool for research in the fields of current international relations and international law.

The price of the Cumulative Index is $15.00 (a special price of $10.00 is accorded to members of the American Society of International Law). You are invited to send your order, together with your check, to International Legal Materials, 2223 Massachusetts Avenue, N.W., Washington, D.C. 20008.

Occasional papers of the American Society of International Law on salient issues of world institutions and order:

LONG-TERM INTERNATIONAL MONETARY REFORM

A Proposal for an Improved International Adjustment Process by the Society's Panel on International Monetary Policy

Agreement in the Group of Ten on December 18, 1971 on a new pattern of exchange rates gives increased importance to international management of balance of payments, surpluses and deficits through consultation on and co-ordination of countries' economic policies affecting their international accounts. This will be essential in order to make the new system work properly in the future. The proposal of the Society's Panel is aimed at exactly this objective: a structural change in the consultation and co-ordination procedures of the international monetary system to permit a system of relatively fixed exchange rates to function effectively. One dollar. Orders may be placed, to the attention of Mrs. D. Bodison, at the American Society of International Law, 2223 Massachusetts Avenue, N.W., Washington, D.C. 20008.

THE INTERNATIONAL TELECOMMUNICATION UNION: ISSUES AND NEXT STEPS

A Report

by the Society's Panel on International Telecommunications Policy

Published as an occasional paper of the Carnegie Endowment for International Peace, this innovative paper may be ordered for one dollar from the Endowment, 345 East 46th Street, New York, New York 10017.